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No. 85-1433

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1985

GLORIA RICHARDSON, WARDEN
Petitioner

vs.

CLARISSA MARSH
Respondent

ON WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

JOINT APPENDIX
VOLUME II

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PROSECUTOR'S CLOSING ARGUMENT

(434) THE COURT: Do counsel stipulate that all members of the Jury are present and in their respective places?

MR. KRISCIUNAS: The People so stipulate.

MR. HILL: Defendant so stipulates, your Honor.

MR. WALKER: Defendant Clarissa Marsh so stipulates.

MR. KRISCIUNAS: The People have no objection to excusing Miss Dickey because of the fact that she had to go to a funeral.

MR. HILL: Defendant Williams has no objection also.

MR. WALKER: We have no objection, your Honor.

THE COURT: It should be pointed out that it was agreed prior to this time.

PROSECUTOR'S CLOSING ARGUMENT

Mr. Krisciunas, are you ready to proceed with argument?

MR. KRISCIUNAS: Yes, your Honor.

Good morning, Ladies and Gentlemen of the Jury. First of all, I would like to thank all of you for your patience throughout this trial. As you know, many times you go back in the juryroom and probably wonder what we're doing out here. I assure you that we're working, that there are several matters that have to be taken care of out of the presence of the Jury, and we have been doing that every morning, and also in the afternoons when you haven't been able to see us.

The testimony is now over and the arguments (435) about to begin. Soon you will get the instructions from the Court on the law to be applied to this

case. The format of the closing argument is that I speak to you first, because I have the burden of proof in the case. After that, Mr. Hill will speak on behalf of Defendant Williams and Mr. Walker will have an opportunity to speak on behalf of Defendant Marsh. After they have argued to you, I get what is known as the rebuttal, the opportunity to speak to you a second time. And the purpose of that is to answer any questions that were raised by the Defendants, or to respond to certain arguments that perhaps I didn't raise in my closing argument.

Now, during the course of the trial if I did anything to upset any of you, I opologize(sic). I hope that you don't hold it against the case of the People.

The purpose of the closing argument is to narrow down the issues for you and to clarify some of the legal

matters, to summarize the testimony and give you our theories of the case to assist you in reaching a verdict, to assist you in your deliberations and to focus on the issues of the case.

The Court has the duty to instruct you on the law, and the Court will tell you about the different verdicts in this case.

Now, if you recall, when I read the Information, there were three charges in this case; two counts of First Degree Felony Murder, and one count of Assault With Intent to Murder. I (436) would like to read the Information again, reminding you that it is not evidence in this case. The evidence came from the witness stand. But it is important because it tells you what the People have to prove. We have to prove that on October 29th, 1978, at 12627 Mendota in

the city of Detroit, the Defendant Clarissa Marsh and the Defendant Benjamin Williams, while in the perpetration or attempted perpetration of a robbery, did kill and murder one Ollie Scott.

In Count II, while in the perpetration or attempted perpetration of a robbery did kill and murder one Koran Knighton.

Count III, did assault Cynthia Knighton with intent to murder with a certain weapon, to-wit, a hand gun.

Very simply, Count I talks about First Degree Murder, Count II is First Degree Murder, Count III is Assault With Intent to Commit Murder.

Now, the Court is going to instruct you on lesser offenses, and it's not unusual; it happens in every case. Taking a look at Count I -- let's look at Count III first. Count III is Assault With Intent to Murder. The Court will

not instruct on any lesser included offense other than Assault With Intent to Murder. Count I, charging First Degree Felony Murder, the Court will instruct you on the law as to First Degree Murder, the Court will instruct you on the law as to Second Degree Murder, the Court will instruct you on the law as to what an Armed Robbery is, and Armed Robbery will be what is known as the lesser (437) included offense to the crime of Felony Murder. Should you feel that there is insufficient evidence to show that either of the Defendants or both the Defendants lack the requisite intent to kill, but you are satisfied that they participated in a robbery, you could then find them guilty of robbery and find them not guilty of First Degree Murder or Second Degree Murder. Those would be your choices.

PROSECUTOR'S CLOSING ARGUMENT

In addition to the Armed Robbery, there are certain lesser included offenses to that crime; there is the crime of Assault With Intent to Rob While Being Armed, and the crime of Attempt Robbery Being Armed.

So in Count I you are actually going to have six possible verdicts. You can only return one verdict as to each Defendant on Count I. You may find the Defendants guilty -- and you can have different verdicts for each Defendant, too -- but you can find as to Count I, Defendant guilty of First Degree Murder, or guilty of Second Degree Murder, or guilty of Armed Robbery, or guilty of Assault With Intent to Rob Armed or guilty of Attempt Robbery Armed, or not guilty. That applies to both Defendants; you can find any one of those as to Count I.

You can do the same thing as to County II, with the exception that you are only going to get three possible verdicts in Count II. In Count II, we're talking about the killing of Koran Knighton. In Count I we were talking about the killing of Ollie Scott during the perpetration of a robbery of Ollie Scott. (438) so that's why the lesser included offense applies there.

In Count II we're talking about the killing of Koran Knighton during the robbery of Ollie Scott. You may find three possible verdicts: Guilty of First Degree Murder, guilty of Second Degree Murder, or Not Guilty.

As to Count III, as I told you, you can find the Defendants either guilty or not guilty of Assault With Intent to Murder.

You don't have to remember all of these because the Court's going to

give you a verdict form and the Court is going to instruct you on the law as to all of those crimes. And when you go into the juryroom, believe me, you're going to understand everything, because every jury that has ever sat before has been able to understand the law the same way, and I'm sure they came in with the same frame of mind that you did.

Now, as I told you, it's important to consider the evidence separately against each Defendant. And because the evidence must be considered separately, in fairness to each of the Defendants, I would like to argue separately.

First of all, I would like to talk about the Defendant Benjamin Williams. I told you in the opening statement that your job is really twofold. Your job is to determine first

of all whether Benjamin Williams was present, whether he was the man we claim was there.

Second, if you're satisfied he was there, what (439) crime is he guilty of, if any. I submit that the testimony has shown that there is no question that Mr. Williams was there. He was identified in the testimony of Cynthia Knighton and he confessed to being there to the police.

Then the next question becomes what is he guilty of? And I submit that the evidence is clear that he is guilty as charged. By that I mean that in Count I he is guilty of First Degree Murder, Count II he's guilty of First Degree Murder, Count III he's guilty of Assault With Intent to Commit Murder.

Now here the law of aiding and abetting is important. As I told you in

my opening statement, it's unnecessary that Mr. Williams to actually have pulled the trigger and fired the bullet that killed Ollie Scott. It's unnecessary for Mr. Williams to have pulled the trigger and fired the bullet that killed Koran Knighton. It's unnecessary, under the law of aiding and abetting, for Mr. Williams to have pulled the trigger and fired the shots that hit Cynthia Knighton, because the Court will tell you that all persons who aid, abet or assist another during the commission or attempt to commit a crime are just as guilty as the person who actually committed the crime.

I would like to give an example of a baseball team. When a baseball team wins a game, all nine players share in the victory, regardless of what role they participated in. In-fielders,

out-fielders, pitchers, catchers, designated hitters, pinch-hitters, pinch-runnders(sic), coaches and managers, they all have (440) different responsibilities; but when the game is over and they've won, they all won the game, regardless of whether they hit a home run or whether they struck out. The same thing applies in an armed robbery case, where teamwork is necessary and all the defendants have different jobs. For instance, there's one person that goes into a store with a gun and announces a holdup. There is a second person that doesn't have a gun, but he goes to the cash register and takes the money from the register. There's a third person that stands by the door and acts as a lookout to make sure that no one interrupts the robbery. And there's the first person that sits in the getaway car

to make sure that once the robbery is completed they can flee the scene. All four persons have important roles in the commission of the robbery. Should one of those persons fail in his role, the whole robbery may become incomplete; it might go down. That's why the law says that all who aid or assist or abet in the commission of a crime are equally responsible. They all share in the proceeds of the robbery. They all share in the guilt for the robbery and the responsibilities for the robbery when they are caught.

I'll talk a little bit about the crime of murder in Michigan. There are two degrees of murder; there's Murder in the First Degree and Murder in the Second Degree. All murder in Michigan is Murder in the Second Degree. The way that you get a crime of murder into Murder in the First Degree is by adding

(441) an additional element. If you have a murder committed during the commission of another felony, it raised the crime from murder in the second degree to murder in the first degree.

Murder is defined as having two elements. You are required to have -- a person who is charged with murder is required to have intended -- strike that. Murder requires two elements: First, the killing of a person; second that the person had malice.

Malice is defined as an intent to kill, or secondly, if the defendant knowingly created a very high risk of death to the victim, with knowledge that it probably would result in death.

I submit to you that when you look at murder, you require an unlawful killing. The testimony in this case clearly shows that there was an unlawful killing.

PROSECUTOR'S CLOSING ARGUMENT

You heard the testimony of Cynthia Knighton and the details of how the killing went down. You heard the testimony of the Wayne County Medical Examiner; he testified to the nature of the wounds and how the wounds were to the back of the head of Ollie Scott and to the back of the neck of Koran Knighton. There was testimony that the wounds were contact wounds, that there was soot from gunpowder. He indicated that the bullets were fired from one to two inches away. he indicated that it was not an accidental killing; that these were serious killings, intentional killings. They were not lawful killings and not excused (442) in any way.

Certain killings might be excused. For instance a soldier in war, during the course of battle, he kills the enemy. The police officer shoots a felon during the course of the commission of a

felony. A person acting in self-defense because he's being attacked by another and his life is in danger, these are lawful killings. These are excused.

I submit that in this case it is clear that we can't have that type of a killing. We have an unlawful killing.

So to summarize, the elements of Second Degree Murder are unlawful killing with malice, and to make it First Degree Murder we have to show that this unlawful killing with malice was committed during the perpetration of a felony. Before we can prove First Degree Murder, we have to show that a robbery was committed.

I submit that as to the Defendant Williams the testimony is clear that he assisted Kareem Martin in the perpetration and the commission of a robbery. You recall the testimony that when Kareem Martin came into the house

and after he pulled his gun, a short time later Mr. Williams came into the house. And after he made his comment about being so-and-so's brother, that's the first thing that he said, "Where's the money?" So it shows that when he entered his intent was to rob. When Kareem Martin took Ollie Scott upstairs, Benjamin Williams remained downstairs with Cynthia Knighton and Koran. Why did he do that? To assist (443) in making sure that they stayed downstairs. And then he too went upstairs, and then we have the circumstantial evidence of what happened upstairs. The room was ransacked. Take the photographs that we have introduced into evidence and look at those photographs.

You have the testimony of the police officers, the testimony of Cynthia Knighton, that when she came upstairs the

room was ransacked. When the man came downstairs they handed Clarissa Marsh a bag. I submit that that shows that the robbery was committed or at least attempted to be committed, and it was during the course of this robbery that the killings took place.

In addition to the testimony from Cynthia Knighton and the police officers about the circumstances of the robbery, we have the statement by the Defendant. He states that on October 29th, 1978, he was at his girl friend's house in Highland Park, and "I received a phone call from a friend of mine named Kareem Martin. He said that he had been looking for me and James Coleman, who I call Tom. He asked me if I wanted to go on a robbery with him. I said okay. And about 15 or 20 minutes later Kareem came by in his car. I got in the car and

PROSECUTOR'S CLOSING ARGUMENT

Kareem told me that he was going to stick up this crib, this place was a numbers house. Kareem said that there would be over $5,000 or $10,000 in the place. Kareem said that he would have to take them out after the robbery."

I submit that this shows that in fact Mr. Williams intent in going to that home as to in fact commit a robbery. So (444) I submit we've satisfied the first element of First Degree Felony Murder.

We look to the next element. The next question that we have, did a murder take place and was the Defendant reponsible for the killing? I think it is clear again that an unlawful killing took place for the reasons that I stated before the Medical Examiner testified about the details and Cynthia Knighton testified about the details and I don't

think there's any need to go into those details any further. I have submit that we've proven the second element to prove First Degree Felony Murder. We have proven that a robbery occurred, that an unlawful killing occurred.

The third element that we must prove is that the Defendant acted with malice. I remind you that to show malice we have to show that the Defendant either intended to kill the victims or that he knowingly created a very high risk of death with knowledge of the possible consequences. I believe the testimony is clear that Mr. Williams is guilty of First Degree Murder as an aider and abettor. Although he didn't actually pull the trigger, he knowlingly put the victims in a position so that Kareem Martin could pull the trigger. You will recall that he knew, in his statement

that he made, in his confession -- that he knew before he even went over to the home on Mendota that there was going to be a killing. Kareem said that he would have to take them out after the robbery. This is what he knew before he (445) went to the home. You will recall, too, that when the actual robbery was completed, when the actual taking of things was completed, when the actual ransacking of the house was completed, Mr. Williams didn't leave, but he stayed around. Why did he stay around? To complete the plan that he had with Kareem Martin. Why couldn't he leave? Because there were potential witnesses alive, witnesses who could identify Benjamin Williams, who could identify Kareem Martin, who could identify Clarissa Marsh.

Kareem martin, you will recall the testimony, took Mrs. Scott down to

the basement. The Defendant Williams responsibility was to take Cynthia Knighton and Koran Knighton to the basement. It was made clear again when Kareem Martin in the basement says, "We're going to have to hurt them." And what was the Defendant's intent? Did he intend to kill? I submit that -- you remember I told you about the instructions on intent? A person's intent is expressed in two different ways, through a person's words and through a person's conduct. Mr. Williams' intent was clear because at the time that Kareem Martin fired the fatal shots that killed Mrs. Scott, Mr. Williams was some six feet away, somewhere in the center of the basement. And what was he doing? He had his gun out and he was pointing it at Mrs. Knighton and her son Koran. And his

purpose as to make sure that they couldn't escape. Why else would he be standing downstairs in the basement with his gun out pointing it in that direction?

(446) You will recall, too, the testimony of Cynthia Knighton, who told you that after the two shots were fired that killed Mrs. Scott, I asked her a question, "Mrs. Knighton, after the two shots were fired from the area where you(sic) aunt was, why didn't you try to getup(sic) and try to run away?" She told you very clearly, "I couldn't, because that man, Mr. Williams, was standing there holding a gun pointing it at me and my son." But for Mr. Williams' participation in the basement she might have been able to escape the basement. But for Mr. Williams' participation, Kareem Martin might not have been able to

put himself in the position close enough to inflict a deadly wound in Koran Knighton. You recall the testimony, it was a contact wound. But for the Defendant Williams, Kareem Martin might not have been able to get close enough to shoot Cynthia Knighton three times. And it is clear, I submit, that the Defendant is guilty of First Degree Felony Murder of Ollie Scott in Count I, he is guilty of the First Degree Felony Murder of Koran Knighton in Count II and he is also guilty in Count III of Assault With Intent to Murder on Cynthia Knighton. Count III charges him with Assault With Intent to Murder, and the only reason there is a Count III of Assault With Intent to Murder is that through the grace of God Cynthia Martin's(sic) life was spared and she as allowed to stay alive.

PROSECUTOR'S CLOSING ARGUMENT

You may ask yourselves about the confession that the Defendant made where he confessed to the robbery and tried to take himself out of any participation in the shooting. I (447) submit that it's understandable to make a statement, as Mr. Williams did to the police, especially under the circumstances. I doubt that anyone would want to admit that they participated in the shooting of a four-year-old boy. I doubt if anyone wants to admit that they participated in the shooting of a 32-year-old woman. So it's clear when you look at his statement and he tries to take himself out of it that it's not enough for a reaonable doubt. You look at the statement, he says, "I came downstairs and then Kareem came down with the lady. I said, 'let's go, let's go.' Kareem said no. Kareem then took the two

ladies and the little boy down to the basement and that's when I left to go to the car. I went to the car and got in the back seat. A couple of minutes later Kareem came to the car and said that he thinks that the girl was still living because she was still moving and he didn't have any more bullets. He asked me how come I didn't come down to the basement and I said I wasn't doing no shit like that." He might have wanted nothing to do with the killings, if that's what he did, if he would have left the basement at the time the shots were fired, or if he had not been in the basement, as he claimed. But you will recall the testimony of Cynthia Knighton, who remembers that night, and she told you that when Kareem Martin got on his knees and knelt before her and pulled up the blanket, and just before he fired the

shots she looked and she saw Mr. Williams standing directly behind Kareem Martin with a gun, therefore, Ladies and Gentlemen, as to Defendant Benjamin Williams (448) I ask you to return verdicts as charged, Guilty of First Degree Felony Murder, Count I; Guilty of First Degree Felony Murder, Count II; and Guilty of Assault With Intent to Murder in Count III.

Now, the same law that applies to Mr. Williams applied to Clarissa Marsh as well. The People must prove the same elements that I talked about in my discussion about Mr. Williams. her guilt, of course, is to be determined separately from the evidence, but you may consider the same evidence that you heard from the witness stand. The only thing that the Court will instruct you that you cannot consider is that statement that was made by the Defendant Williams. You

cannot consider that statement when you determine her guilt or innocence. To do so would be unfair. The Court instructed you on that.

But I submit to you that you don't need that statement to reach a verdict in this case. The verdicts again are the same. You may find Clarissa Marsh guilty of First Degree Felony Murder in Count I, of Second Degree Murder, of Robbery Armed, of Assault With Intent to Rob Armed or of Attempt Robbery Armed, or you may find her not guilty. In Count II you may find her guilty of First Degree Felony Murder in the killing of Koran Knighton, or guilty of Second Degree Murder, or not guilty. In Count III, you may find her guilty of Assault With Intent to Murder, with the complainant being Cynthia Knighton, or not guilty. The law of aiding and abetting applies with full force to her.

Remember my example about the baseball team, the teamwork necessary for the completion of a successfuly armed robbery; apply it to her. Apply that same law. All persons share equally in the proceeds of the robbery. All person share equally in the responsibility. All people share equally in the guilt.

I submit to you, Ladies and Gentlemen, that it is clear at the bottom line that Clarissa Marsh is guilty of Armed Robbery. You will recall the elements that we have to prove to convict her of First Degree Felony Murder. We first have to establish that an Armed Robbery, a felony, was attempted or was completed and was committed by Clarissa Marsh; that she assisted in the perpetration of that felony, the armed robbery. Secondly, we must show that an unlawful killing occurred. Thirdly, we

must show that she acted with malice, that is that she intended to kill or place the victims at a very high risk with the knowledge that certain consequences of her acts place them in the danger of death.

Some things to remember about Clarissa Marsh are that she knew Ollie Scott; that she knew that Mrs. Scott had money; that she knew that she was working in numbers; and that she came to Ollie Scott's home with Kareem Martin looking to get some money.

I submit that she intended to rob Mrs. Scott and that she did this can be seen from her words and from her conduct.

As i told you, when you look at a person's intent, (450) it is expressed by their words and by their conduct. The People's theory is that the entire

robbery was planned by the two Defendants and Kareem Martin prior to going over to Mrs. Scott's house, and that this plan is evident for several reasons from the evidence. First of all, when Kareem Martin pulled out his gun, Clarissa Marsh's conduct indicated that she intended to rob, because immediately she stood up and walked over to the door and began looking out of the peephole. I submit that this was part of the plan because Kareem Martin didn't have to say a word once he pulled the gun out. As soon as he did it she stood up and walked to the door; and that her purpose was three-fold.

The first purpose was to be a lookout.

The second purpose was to prevent an escape by any of the victims.

The third purpose was to let Benjamin Williams into the house.

Miss Marsh was asked why she went to the door on direct examination by her attorney, and I'm sure you'll recall her answer because she said she didn't know, she just went to the door.

Why did she say that? i submit that because that's the only thing she can say to clear herself of this crime. If she tells you. "The reason I went to the door was because that was my role in this plan," then she admits to the robbery, and (451) she can't do that. So she's got to tell you, "I don't know, I just stood up and went to the door." I think this conduct indicates that it was part of a plan.

The Court is going to instruct you that when you look at a witness's testimony you look at a lot of different factors, and one of the factors that you look at is whether that witness's

testimony is reasonable, when it is considered in light of all the evidence in this case, and whether it is reasonable in terms of your own general experience and your own knowledge. if she went to the door and she never said a word, I submit that if you were under similar circumstances, that you were a friend and you came over to a friend's house and pulled out a gun, that your friend would show some kind of surprise, that your friend would say, "What's going on? What are you doing? Don't do this. This is my friend." I submit that at worst you'd sit silently on the couch, but not get up and walk over to the door and be looking out of the peephole.

Another way to see that the robbery was planned by all three of the Defendants is that when Kareem pulled a gun he said something about Ollie Scott

knowing about so-and-so's brother being killed. I'm sure you remember that testimony. Ollie Scott made no reply or she said she didn't know what Kareem was talking about. And what did Clarissa Marsh do? And this is where I submit that it shows that she had the intent and that she planned -- did she stay silent? Did she act surprised? (452) No. What did she say? Cynthia Knighton says Clarissa Marsh says. "You know Ollie. You know Mrs. Scott. You know so-and-so's brother; you were over there last week." Now, why is that important? By itself it may not be important. But if you recall, when Benjamin Williams first comes into the house what's the first thing that he says? "I'm so-and-so's brother." Isn't it interesting that all three Defendants, all three perpetrators, make that same

comment. And after he announces himself as being so-and-so's brother that Miss Marsh talked about and that Kareem talked about, that that's when the robbery goes down. Mr. Williams says, "Where's the money?" Why would she say something like that. Why would she follow up with what Kareem said about Mrs. Scott knowing so-and-so's brother being killed? Because she was part of the plan. It's important in light of her testimony when she says Kareem drives over to Benjamin Williams' home and picks him up to go over. What's the thing that she says? "Well, I'm sitting in the back seat of the car." "Did you hear any conversation that was going on in the front seat between Kareem and Mr. Williams?" "No, couldn't hear any conversation. The radio was too loud." I asked you whether that is reasonable. Why did she say that? Why did she say she couldn't hear

any conversation? She said, "I know they were having conversation but I couldn't hear it because of the radio." Because if she admits that she heard the conversation and she admits to the plan, she's guilty of at least armed robbery. So she can't tell you that. How else (453) do you know that she planned the robbery and was guilty of First Degree Felony Murder as well as the robbery? Recall that the doorbell rings and Kareem says to Mrs. Scott, "Who's at the door?" Mrs. Scott says she doesn't know. If you recall the posture of Kareem Martin at the time; he's got his gun out and he's angry, and the obvious question, it seems, is if Mrs. Marsh doesn't know what's going on, this is a complete surprise to her, the obvious question for Kareem to ask is, "Clarissa, who's outside? Who's at the door?" But he

doesn't do that. He doesn't have to ask her who's outside, because Clarissa looks out the peephole and she sees that it's Benjamin Williams, and she doesn't say anything like, "It's Benjamin Williams, Kareem. What should I do? You've got your gun out and you're angry and everything; shall I let him in or shall I keep him outside?" Is it reasonable to just open the door and let Benjamin Williams in? I submit it is reasonable when it's part of a plan, part of a plan to rob what was made beforehand. Doesn't it seem likely that Kareem would ask her who is at the door? "Is it a neighbor? is it a friend? Is it the police?" But he never had to ask any questions. She just opened the door and let Benjamin Williams in. Kareem doesn't have to ask, Clarissa Marsh doesn't have to answer because they've already planned on what to do.

Let's look at some other conduct. When she goes to the door what does she do? Does she just stand there staring at the wall, that she claimed in her testimony? I submit that she does more than that. Cynthia Knighton, who was there, had an opportunity to observe her. She was within two to three feet from her as she laid on the floor. Her feet were two to three feet from Clarissa Marsh, and she said that as she turned she could see Clarissa Marsh and she could see what she was doing. She was looking out the peephole. Why? Because she was a lookout.

I submit that again her intent, her knowledge, her guilt is expressed by her conduct. You will also recall that at one point when Kareem Martin took Mrs. Scott into the kitchen that Cynthia Knighton got up and tried to get away.

She breaks for the front door -- she grabs her son and she runs for the front door. Is she successful in getting away? No. Why no? Because Clarissa Marsh was doing her job; she stopped them from escaping. It's not the kind of a situation that Mr. Walker tried to show in his examination of Cynthia Knighton. It's not the kind of a collision where Clarissa Marsh's hands were just out in front of her as though to protect herself. No. Clarissa Marsh actually grabbed Cynthia Knighton by the shoulders and held her tight enough so she couldn't get away, as Cynthia Knighton testified to.

Now, what happens after she grabs her by the shoulders? Cynthia Knighton says, "I turned around and she was still holding me from behind." So again, Clarissa Marsh's conduct shows her

guilty knowledge, her willing participation in the events, and her intent to take part in the robbery.

(455) Mr. Walker cross-examined Cynthia Knighton about whether Clarissa Marsh said anything or called out to anyone when she ran toward the door. And I think you can see it was really unnecessary for Clarissa Marsh to say anything, because Cynthia admitted that when she got up to run to the door she made a lot of noise and that immediately as she got to the front door she saw that Benjamin Williams was already coming back toward her and he had the gun out and he told her to lay back down on the floor. I submit that Clarissa Marsh had no need to call Benjamin Williams because she was in complete control of the situation. She had grabbed Cynthia Knighton. Cynthia Knighton wasn't going anywhere.

Benjamin Williams was coming there with the gun to assist her to make sure that she wasn't going anywhere. So there was no need to talk, no need to say a single word.

Further, when Mr. Martin and Mr. Williams come downstairs they've got a bag in their hand. What do they do with that bag? Who do they give it to? They give it to Clarissa Marsh. Clarissa Marsh says that she took the bag and she set it down. That doesn't jibe with the testimony of Cynthia Knighton. When he asked her what did she do with the bag she said she held it in her hands.

You can express your intent by your words and by your conduct. The thing that stands out the most throughout this trial about the entire robbery and all the circumstances about the robbery is the lack of words throughout the

robbery, the lack (456) of any communication between the parties involved. Didn't that strike you as a bit unusual for an impromptu robbery? Wouldn't you expect in a robbery for the robbers to come in and communicate? "Okay, I'm covering these people. Why don't you take Mrs. Scott upstairs. If you need me just call down and I'll be right here." When Benjamin Williams went upstairs and he left Clarissa Marsh downstairs, do you recall the testimony, did he say anything to her? No, didn't say anything to her. Wouldn't you expect, if the robbery was committed between Benjamin Williams and Kareem Martin and Clarissa Marsh is the surprised person caught in the middle -- wouldn't you expect Benjamin Williams to say, "Hey, if she tries to escape call me, I'll be right here and I've got my gun."

PROSECUTOR'S CLOSING ARGUMENT

I submit again, Ladies and Gentlemen, that the lack of communication between the people committing the robbery shows a well-conceived, planned, professionally executed robbery. All of the parties knew what their job was once they got inside. There was no need to say anything more than necessary.

Furthermore, and probably most importantly, isn't it interesting that when the Defendants went upstairs they had enough confidence in Clarissa Marsh to leave her alone downstairs with Cynthia Knighton? Defendant Williams and Kareem Martin felt secure enough in going upstairs while Clarissa Marsh stayed downstairs that they never had to say a word to her. There were two people, Cynthia Knighton and Koran Knighton, who, if they got (457) out, might alert a neighbor or might call the police and

might botch up the robbery. But they were confident and secure in Clarissa Marsh that she would do her job.

I submit, Ladies and Gentlemen of the Jury, that when you look at all these facts together -- you can attack perhaps one of the things that I've argued about saying that that alone doesn't show that she planned the robbery. The mere fact that she had the bag in her hand, that alone doesn't mean that she had anything to do with the robbery. But I think when you consider all the facts and circumstances, when you look at all of Clarissa Marsh's conduct, you'll be satisfied that she is guilty of the crime of Armed Robbery and that the People have satisfied the first element of First Degree Felony Murder.

If I might digress for a moment, all the testimony about Clarissa Marsh's depression, about her attempted

suicide, I submit that all that was was a smoke-screeen to try to get you -- to get her out of any responsibility for what happened at the address on Mendota. It was an attempt to try to get some sympathy for this mother of two. And you know why. It's easy to convict a criminal for a crime when you look at the person as a criminal. But it's not so easy to convict a person when you look at the person as a mother of two. I submit that from her conduct she showed you that she committed the crime of Armed Robbery.

Important, too, there's no room for sympathy in (458) this case, and that goes both ways. You can't find these Defendants guilty merely because you're sympathetic to Cynthia Knighton or Koran Knighton or Mrs. Scott or the families of those people. But likewise, you can't find Clarissa Marsh or Benjamin Williams

not guilty merely because you're sympathetic to them. You can't find Mrs. Marsh not guilty because she's the mother of two. There's no room for sympathy in your deliberations. Your job is to determine the hard, cold facts and applying the law to those facts and then reach the proper verdict.

Now, let's look at the other elements of First Degree Murder. We have to show that a killing occurred. There again, the same testimony applies to Mrs. Marsh. You heard the testimony by the Medical Examiner as to the cause of death. You heard the testimony of Cynthia Knighton as to the details of the killing. There was no justification, no cause for the killings. It was an unlawful killing. I submit that the people, through that evidence, have satisfied the second element of First

Degree Murder. I submit that the law of aiding and abetting applies to murder as well, to the assault with the intent to murder.

So then the final question becomes whether Clarissa Marsh had the necessary malice, the final element of First Degree Felony Murder. Malice, you will recall again, requires either an intent to kill or a knowingly created high risk of death to the victims, knowingly creating that high risk of death to the victims with the knowledge that it would probably result in death to the (459) victims.

And as to part two, I submit to you that the Court will also tell you that if you find that Clarissa Marsh conciously intended to commit or attempted or assisted another in the commission of an armed robbery, you may

infer that she knowingly would cause death. I submit that when you see that Clarisa Marsh was in the planning stages of the robbery, you will clearly see why then that she had to be aware of the high degree of risk of death that she caused the victims to be placed in.

For these reasons -- most importantly, she had a reason to see that these victims were killed. First of all, she knew Ollie Scott, she knew that Ollie Scott could recognize her. They knew each other for some two years. She knew that Ollie Scott, if she was left alive, could call the police and tell them the name and address of Clarissa Marsh; that she could be a witness, that Cynthia Knighton could be a witness and possibly Koran Knighton could also be a witness. And that when she entered the house she realized that she couldn't just kill

Ollie Scott and leave the other two witnesses. What good would that do? She would still have Cynthia Knighton, who could identify Clarissa Marsh as being there during the killing of Mrs. Scott, so if you have to kill all three, you'll have to do it, to protect yourself. And I submit that she had to know that when she entered the house, that she had to know that when she planned the robbery; that she (460) had to expect that Ollie Scott would be there; that she had to expect that Ollie Scott would have to be killed; that she had to know that if Mrs. Scott was not alone that others too would have to be killed. You see, Clarissa Marsh was the key to this whole case. She was the one who opened the door to get into the house. She was the one that Mrs. Scott recognized from their friendship of two years. What do you

think the chances would have been of Kareem Martin getting in by himself at that time on that date? And not only was she the key to get in, she was also the lock on the front door to make sure that nobody got out. So all the men provided the muscles and the guns, she provided the pass key to go in and out of the house on Mendota.

I submit to you, Ladies and Gentlemen of the Jury, that her testimony was also unreasonable in what she did after the commission of the robbery. You will recall her testimony, she said that when she left the house on Mendota sometime around seven-thirty, she went and got her kids and she drove around thinking. She drove and(sic) around and around and she got tired and she finally called her brother, Clarence Jackson. But when did she do that? She did it

sometime between three and four in the morning, some seven-and-a-half to eight-and-a-half hours after she claimed she left the address on Mendota. You look at the testimony of a witness and you evaluate that witness's testimony. And you look at the reasonableness of her testimony when you consider it in light of all the other evidence in this case, in light (461) of your own general background, your own knowledge. I submit that it's more likely that what really happened is that the Defendants got together and planned to do what's next; that Mrs. Marsh did get her kids -- obviously, she couldn't leave them behind after what happened at the house on Mendota; that she dropped off Benjamin Williams and Kareem and then she went to hide out at the motel in Highland Park; that she planned to meet the other

Defendants there; that she didn't park the car in the lot so as not to give suspicion to the car or to the fact that she was there. I submit that she would have had to have gotten there sometime after eight o'clock in the evening, and that after dropping off Kareem and Benjamin she waited and waited for Kareem to come back; that he would come back in a different car because if there's anyone alive there, if there's anyone that recognized the car, they would be looking for that black Monte Carlo. So they would have to come back with different plates. It comes to around three or four o'clock in the morning, no sign of Kareem, no sign of Benjamin Williams. What to do? I submit that she couldn't get ahold of anybody else. So that's when she called her brother, Clarence Jackson, at sometime around three or four

in the morning and told him she had an argument with Kareem, "I've got the kids with me, I need some money. Can you put me up in this motel?" So Clarence Jackson comes, and does she tell Clarence Jackson about what happened, this horrible experience at Mrs. Scott's home; that Kareem pulled a gun and committed a robbery (462) along with another man; that she was involved in this and that she too might be implicated in this? "Please Clarence, help me. What should I do?" Does she ask that? No. She stays and she gets a room. Why didn't she tell Clarence jackson? Because she was a willing participant in the robbery and in the killings. She gets in the room and she testifies that she waits and she hears news in the morning about the killings, so she discovers that the police already know about it. What else

does she do? Who does she call? Does she call Clarence Jackson, her brother? No. Does she call Reverend Charlie Marsh, a minister? No. Who does she call? She calls Kareem's sister. And I submit that when she calls her she says, "Where is Kareem?" And at that point she finds out that Kareem is not there any longer. And then the only response is "What should I do not(sic)?" And she gets the name of a lawyer and then she turns herself in voluntarily. I submit that that's no big deal in this case. She knows in the evening of the day following the killing that the police are looking for the perpetrators of the crimes. She knows that the police knows these people were armed and could be dangerous, so they might come looking for her with their guns drawn. She knows, too, that maybe it would be safer in the

police station that(sic) it would be out in the streets, especially when the word spreads that she was involved in the killing of a four-year-old boy and a 33-year-old woman. Isn't it interesting that she left her car somewhere not far from the Crown Motel and that she gave the keys (463) to her brother Clarence, along with her kids, at two or three o'clock in the morning. The reason she did that, of course, is that the car is in her name, she can't drive it now, especially if the police are looking for that car. And she knows that if she waits at the motel for Kareem that he'll come in a different car.

So I submit, Ladies and Gentlemen of the Jury, that all of these facts, all of that testimony, points to only one inescapable conclusion; that the Defendant Clarissa Marsh is guilty of

PROSECUTOR'S CLOSING ARGUMENT

Count I, Murder in the First Degree of Mrs. Ollie Scott; that in Count II, she's guilty of Murder in the First Degree of Koran Knighton; in Count III, she's guilty of Assault With Intent to Murder.

I thank you for your attention.

DEFENSE CLOSING ARGUMENT

(482) MR. WALKER: If it please the Court, before I get started I would just like to thank everyone on the Jury for your attention. It's been very difficult for all of you, but you paid good attention and we all appreciate that. Of course something like this is not pleasant. It's a horrible crime. We (483) are not here to try to excuse it or minimize it. We all feel bad. It's one of those things. But we all have a job to do, and when something unfortunate like this happens people find the inner strength and they deal with it, and someone definitely should be punished for this crime. It was horrible.

But let's not get carried away. I know we talked a lot in opening voir dire about presumption of innocence and keeping an open mind and trying to be

objective. And I'll be first to admit that it's real tough in a case like this. We have to recognize that we have -- as my co-counsel says -- that we have these prejudices. We have these gut reactions. We don't like what we hear; it's not pleasant. Personally, I'll(sic) lived with this case along with Clarissa Marsh for some five-and-a-half months. With exception of Officer Harris, I've probably been involved in this longer than anyone else in the room. And I have spent a little time going over it and visiting Clarissa and getting to know her. It's a much different person that I see sitting here today, five-and-a-half months later, than the trembling shell of a woman that I saw come to my place --

MR. KRISCIUNAS: Objection, your Honor, I think we're going beyond the scope of argument about the

testimony, and now Defense Counsel is arguing about what he observed back in October of 1978, and I don't think that that's proper to comment on his knowledge of Clarissa Marsh back in October of 1978. Anything of a personal knowledge I don't believe he should (484) be able to go into.

THE COURT: The objection is sustained.

MR. WALKER: I opologize(sic) to the Court.

Now, these gut reactions that we have, these things that upset us, that they get in the way of our objectivity. It's hard, it's real hard for you to provide Clarissa Marsh of that presumption of innocence; I know that. But it is your duty as Jurors. In taking the oath you paid good attention and I know you are doing that.

What about this business of innocence; what does it mean? It's something that's guaranteed to us by the Constitution of the United States of America, something that's given to use. Mr. Krisciunas has compared it to baseball when he talked about everybody sharing, and so on and so forth, and he alluded to the sport of baseball. It might help us understand the presumption of innocence to go to a baseball game. And generally, when a baseball game starts out, and a civil case, when it starts out, both sides start out zero to zero, even. Well, with the presumption of innocence, in this baseball game, People versus Clarissa Marsh, this game starts out 1-0 in favor of Clarissa Marsh. That's what that presumption of innocence means. The Prosecution then has to not only score a run, but they've

got to score a run and then they've got to score another run to go ahead. This is their burden of proof. This is the way the system is set up, and rightfully so.

(485) The Prosecution has to establish to you, as you know, that Clarissa Marsh is guilty of the things she's charged with beyond a reasonable doubt, and that is each and every thing that she is charged with and each and every element of the crime that she's charged with. You, as Jurors, need to be satisfied to a moral certainty. You have to be real sure, beyond a reasonable doubt, which is the kind of doubt, the kind of proof, that would allow you ton(sic) convict a member of your own family if they were charged with a crime and you were a juror.

Now, there is a concept in our system of law that is known as mens rea. It's a Latin term and it translates roughly as evil intent, a guilty mind. And what that concept means is that anytime you do something, whether it be considered illegal from the standpoint of an observer or not, that you as the actor, you as the person accused, have to have acted with mens rea, a guilty mind, with that intent. If a person acts against their will, if a person acts in ignorance, they don't have that mens rea; it's not up here. Fortunately, we can't open peoples' heads and see what's inside.

The State has told us you can infer certain things from people's conduct, you can infer certain things from people's actions and people's words. And at the beginning of the case the

DEFENSE CLOSING ARGUMENT

Prosecution stood up here and promised you folks, he promised you that he would show you conduct on the part of Clarissa Marsh that would convince you beyond a reasonable doubt that she was guilty (486) of the crimes charged. He also promised you that he would show you that she was equally involved and therefore equally guilty.

Has he done this? I don't think so. He's asking you to infer, to speculate. He should be asking you to find beyond a reasonable doubt that this happened, and that when it happened there was a specific intent to do an act and that she had mens rea, a guilty mind. he then comes back and asks you, because he doesn't have that proof -- he comes back and asks you to infer this and infer that. What about this, what about this? And he goes on and he tells a nice story.

He's got a nice theory, But it's not supported by one thread of evidence. He's asking you to speculate.

What has he shown us? He's shown us to every one's satisfaction, I believe, that Clarissa Marsh was in the house on Mendota that evening. We've never denied that. There's no doubt about that. He also told us that she was by the door, right here, right in the doorway of this home. She told us that when she was on the stand. She was there throughout the entire incident, with the exception of the beginning when she was sitting on the couch.

Now, what about the testimony from the stand that you are bound to consider? What about that? Did he carry the burden? Did he convince you beyond a reasonable doubt from what was said in that chair -- I think what's come from

that chair would leave you with reasonable doubt as to what Clarissa Marsh's (487) involvement in this incident.

Now, when Cynthia Knighton was on the stand, what did she tell us? All she could tell us was that when she was coming downstairs, or at some point, she overheard part of the conversation, something about Clarissa being there to pick something up. Cynthia Knighton also said that during the conversation between Ollie Scott and Clarissa Marsh that Kareem Martin pulled a gun. And you heard Miss Marsh say she was talking and she noticed a strange look come on Ollie Scott's face when she looked up and sure enough Kareem Martin had a gun and he was pointing it across the room at all four of them. Miss Knighton also said on cross-examination that it was clear to

her who was in charge of this house, and that's Kareem Martin. He was giving the orders. He was motioning people around, he was motioning and ordering people around.

Now, Cythia Knighton also told us about her attempted escape out the door. She was lying on the floor along with her son -- if you can remember, I asked her later about the position of this couch and this table, because when you look at this drawing it's not really clear. It looks like there's a lot of space here. She said that that table was no more than a foot or two from the couch and that the couch stood probably this high, knee high. Cynthia Knighton also said that she was laying facing in this direction, her feet towards the door. Then she says that she was watching Clarissa Marsh over here behind (488)

her. Now, she told you that she was lying prone on the floor, she had her glasses off and she was able to look all the way around to Clarissa Marsh.

Now, granted, Cynthia Knighton was scared, there's no doubt about that. She said that when she bolted to the door she grabbed her son's hand and went to the door. Now, it seems a little improbable to me that she could have grabbed his hand because he was over here. In fact, Clarissa Marsh said that Koran was still sitting on the floor. It's a small point, but it goes to show that Cynthia Knighton was scared. You heard the testimony on the stand during this trial. I would suggest to you that we're talking about a distance of two to three feet from the floor here to the wall -- the doorway. Clarissa Marsh is standing right in front of the door. In

fact, the State keeps telling you she's looking out the door; that there's a peephole in the door. So she was standing right smack dab in front of the door. And she can't see Cynthia Knighton. She's not watching her, apparently. Cynthia Knighton jumps up and the next thing you know she's there, she's on top of her. Clarissa reacts. She says she was shocked. She says, "I might have grabbed her, I don't know. I don't remember." I would suggest that it wasn't an aggressive act on the part of -- she lunged for the door and Clarissa was in the way. She didn't holler up to anybody, she didn't try to restrain her. She didn't run back this way. Then Benjamin Williams came out and put her (489) back on the floor.

From what we know, there were two guns in that house. Clarissa Marsh

never had a weapon of any type in her hand. Cynthia also told us that Clarissa didn't say anything to her when she was at the door. Clarissa told us she was surprised, she was shocked.

At some point Miss Knighton was asked -- and I don't know who asked her this question, I don't believe it was me -- I think it was probably the State -- something about an incident in the basement. It was asked if she tried to escape at this point and she said she didn't. "Why not?" "There were guns pointed at me."

The question may have occurred to you at some point in this trial, why didn't Clarissa Marsh escape earlier? The same guns were on her. What about Clarissa Marsh? The State would like you to believe that she's the passkey to this whole case. Then he goes on and tells us

all about his theory. And I didn't stand up and object to his argument because you folks heard the evidence. All those things he's talking about, I didn't hear one word from the stand about that stuff. You know, all this things about the motel and thing about the plans beforehand. The Judge is going to read you the theory of the State's case afterwards, and the second sentence of that theory says that the Defendants Clarissa Marsh and Benjamin Williams planned to rob Ollie Scott with the help of Kareem Martin. Planned; (490) absolutely no evidence to support that whatsoever. He can't get out from under his burden of proof and he can't establish beyond a reasonable doubt, so he wants you folks to help him out and to speculate at the expense of Clarissa Marsh.

Again, we have to know the state of mind. We have to know about it.

He says we can determine it through her conduct. You have to ask yourself the question, what is the conduct of Clarissa Marsh? Is it that of a guilty person? Was she armed? No. That's clear; there will be no dispute about that fact.

Clarissa testified that when she heard about the murders it was on the early morning news when she was at the motel; that it turned her stomach. Is that the mind of a guilty person? And upon hearing that she started making arrangements to turn herself in. She called some people who got hold of an attorney for her. She called the police -- I called the police on her behalf. You heard the officer say he had talked to me about it. He told me that she had been identified as being on the premises. And I said, "Fine, when she gets here I'll bring her in." And we did. We went

in. We went in about 11:30 at night, down to 1300 Beaubien. i would submit to you that those are not the actions of a guilty person. She never fled. She fled that house and she made arrangements to get herself into the Police Department and for someone to take care of her boys. I submit that that's not the conduct of a guilty person.

(491) You saw Clarissa Marsh take the stand. She testified in her own behalf knowing full well that she would be subjecting herself to extensive cross-examination by a very able trial attorney, that being the Prosecutor. I would submit to you that all these actions are inconsistent with guilty.

Now, what are Clarissa Marsh's legal defenses in this case? That's probably been going through your minds. And I'm going to tell you. I'll lay it

out for you. As you know, from the outset of the case, and you'll find out more about it during the instructions from the Court, Robbery, Murder, Assault With Intent to Murder are all specific intent crimes. That means that the Prosecutor must prove beyond reasonable doubt, among other elements, that Clarissa Marsh had the specific intent to commit these acts; that she went over there knowing that she was going to rob, she went over there knowing that she was going to kill.

Like I say, we can't look into her mind and see specific intent or not you don't see specific intent. You have to look at a lot of things. Why did Clarissa Marsh think she was going to Ollie Scott's house? She thought she was going to Ollie Scott's house to borrow money because she had lost her money and

she needed money. In fact, Cynthia Knighton even heard her when she was going down the stairs saying she had come over there to pick something up. She came over there to pick up a loan. Unfortunately, Clarissa Marsh was a dupe. (492) Do you know what a dupe is? She was used by that man and taken advantage of. Kareem Martin used this woman and abused this woman.

Now, what about the money; she testified she borrowed money from Ollie Scott before on several occasions. In fact, on the last occasion before the 29th of October, Ollie Scott had come over to her house to bring her the money. They had worked together, they talked to one another. They were friends. Clarissa needed a loan this particular day. She said the man didn't get his cop money -- or she had lost his cop money

when she lost her wallet. She called around different places that day, her brother for one. "Can you lend me some money?" "No, I'm sorry, I can't." I believe he had a house note or something and he just didn't have the money to lend her. The wallet was mailed back to her home address and Ms. Jackson got the mail and opened it and saw it was a wallet, but not money, no credit cards. Now, one would expect that with the Prosecution's burden of proof that they would disprove this, and they haven't.

What else tells us that she didn't have the specific intent to rob and to kill? Well, she wasn't armed. We never heard one word about Clarissa Marsh saying anything about robbery. You never heard anything about anyone saying anything in her presence about hurting anyone. I specifically asked that

question, if you remember. I asked Cynthia Knighton (493) specifically that question, if you remember, and she said that the first she heard that anyone was going to be hurt when they were down on the second stairway going downstairs into the basement. The two men were there, Clarissa marsh was not there. What about her intent? Did she ransack the house? Not at all. Every single word that came from that stand with regard to her actions was that she didn't do anything. I submit to you that there is not one bit of evidence as to specific intent on the part of Clarissa Marsh to commit a crime.

Now, Clarissa Marsh's second defense is that of duress or coercion; that when she was duped into going to this house with the belief that she was going to borrow money from this man, he produced a gun and a robbery was under

way. We all used to scoff at the idea that people could be forced to do something that they didn't want to do. Remember a couple of years back F. Lee Bailey tried to show that Patricia Hearst had been brainwashed and she did things she didn't want to do. Then about six months ago we hear about this awful news down in South American where all those people committed suicide at the command of some maniac. Suddenly, everyone says, "Yeah, I guess people can be brainwashed."

Now, the Judge will read you instructions on the defense of duress. I would like to read them to you and then we can go over them --

MR. KRISCIUNAS: Objection, your Honor. I don't (sic) he should read any instructions to the Jury; I think that's the Court's responsibility.

DEFENSE CLOSING ARGUMENT

MR. WALKER: I'm certainly able to explain the defense, your Honor, and I know of no authority that says that I cannot.

THE COURT: Mr. Walker, I believe you can tell them what your opinion of the law is and your opinion as to how it applies to this particular instance, to your client, but I don't think you can read the instructions to them. I think you can argue the elements of that instruction.

MR. WALKER: Okay, your Honor, I will comply with that.

In defining duress, the Judge will tell you that the actions of the Defendant that are brought about pursuant to the threatening conduct of another is duress. Now, we have -- it is clear in this case that Kareem Martin pulled a

gun. Now, how then do we say that this was threatening conduct as to Clarissa Marsh? Well, we had a lot of testimony, we talked a lot about her relationship with this man, Kareem Martin, and the Prosecutor would like to have you believe it was all, and I believe his words were, a smoke screen. It wasn't a smoke screen. It's to enable you to somehow pry open Clarissa Marsh's head and see what makes her tick and to set up the circumstances that surrounded her life at that time and that period in her life, and which culminated on the evening of October 29th at this (495) house on Mendota.

The Judge will further instruct you that a defendant is not guilty if she acted under, or committed an offense as a result of such threatening conduct. Now, how do we determine that? How do we

determine why she acts and what motivates her and what scares her? We have to look at the surrounding circumstances. What are the surrounding circumstances in this case? Clarissa Marsh met Kareem Martin about the fall of 1977. She was 33 years old, lives alone with her two boys. She was introduced to this man by his sister. She starts seeing him a little bit. He comes over around Christmas time and gives the kids gifts; but it wasn't any big deal. But as you remember her testimony from the stand, he got to her through her kids. Those gifts, that little bit of kindness, that warmed her up to the man.

Now, we can sit here and say that she should have known better, but we can't say that. The woman was 33 years old, alone, two children. She appreciated those kindnesses. This man

basically took over her life. We have a lot of evidence about the car; just one small part. This was her car. Her mother had signed for her, she was making the payments. After this incident you heard that the car was repossessed because the payments were no longer kept up. Did she have use of the car? She said only when he didn't have to use it. He took the car over. You heard her brother say that there were times when he had to pick her up (496) and drop her off back home. He abused her physically, knocked her around. When she tried to reason with him he would abuse her. She asked him to leave. In June of last year she discovered that he was a drug addict. She again asked him to leave, get out. He refused. This man had a temper. He didn't have to yell at her. Remember her words from the stand? "Nobody in this

room knows what this man was like when he got that look in his eye."

Ms. jackson, the upstairs neighbor, she was only around that place for two weeks, three weeks, maybe, October, before this incident happened, and she noticed it. And she said that when this man would say jump, Clarissa would say, "How high?" All this background is necessary for you to understand the frame of mind this woman was in on October 29th. She tried to commit suicide, not once, but twice; once in the summer and once not too long before this incident. She told you, folks, as to why she tried to commit suicide. She said it was the only way out. She didn't know any other way out. She figured that her boys would be better off with her mother and she had to get out of that situation because that man

was a tyrant. She described him as overbearing. That's a kind word. Now, some of us have had contact with people with drug addictions; they're hard to deal with. They get moody. They are unpredictable.

You heard from Officer Harris that this man, (497) Kareem Martin, was known to the police; he had a police record. You heard that he used Clarissa, he used her family. It was clear to Cynthia Knighton, who never laid eyes on this man before, that he had some power over the other people in that house; that he was in charge. The Prosecutor commented that he didn't make a lot of demands; he didn't have to. As Clarissa said, "No one in this room knows what this man was like when he got that look in his eye."

Now, when you determine whether or not this woman was under duress, and

the Judge will instruct you as to this, you're supposed to consider the surrounding circumstances. You are supposed to consider the nature of the threats, that is how was he threatening her. He had a gun. You have to consider the nature of the man. She was afraid. She had already displeased him once that day; she lost his money. She went to get a loan, but he said he was going with her to make sure she got the loan. Well, he sure did. He used her for the final time.

You are also supposed to consider the background and the character of the person making the threats. Do I have to say anything about someone who would shoot a baby? You are also supposed to consider the situation of the Defendant at the time of the act. Clarissa was in that house; there's no

doubt that she was in that house, although she wished to God she wasn't. And she took her first opportunity to get out of that house. He had that look in his eye. She was trying to appease him, trying to borrow the money that he needed.

Now, we've heard testimony that when they were at the house on Mendota that a gun was produced; Clarissa was sitting on the couch and she got up and went over to the door. Mr. Martin didn't say anything, he didn't have to say anything. He pointed that gun at her -- you heard her say he waved it, looked at her; well, she got out of the way.

What about opening the door for Benjamin Williams? Even though the Prosecutor said it didn't happen, I heard the testimony and you heard it, Martin said to someone, "Who's at the door?" and

I believe it was Ollie Scott who replied, "I don't know." Clarissa looked out and saw the other man. What was her explanation of that? "God, I didn't know what to do, I saw this man." She said he didn't have a gun at that point, or maybe it wasn't evident. "Maybe he's got to go. Maybe he'll tell Kareem he's in a hurry, let's go. It's our chance to get out? She opens the door. There has been testimony that she was a lookout; that she was looking out the door, she was looking out the peephole. She said she was looking out the door to find out where her car was, and looking for anything; "I want to get out of there." You have to remember that all this time there are guns in that house. Clarissa doesn't have one.

What about the so-called grabbing of Cynthia Knighton? Again, two

sides to everything. She's standing in the door, this person wants to go through the door. What's going (499) to happen? There's going to be a collision. Has he shown you that Clarissa came out and grabbed her, yelled at her or yelled at someone else? No. Where was the other man? He was in here. He saw what happened, evidently, and came out. Kareem Martin came downstairs, he handed Clarissa a bag or bags. He still had the gun and that look in his eye.

I submit to you, everything that Clarissa did in that home is reasonable and is open to your own interpretations by the fact that this woman was scared to death, and her first opportunity, what does she do, she beats it out the door and she runs. She doesn't know where she's running. She sees her car, gets in it and takes off.

Now, that's where the Prosecution came up with this wonderful story about her riding around, despite what she says on the stand, despite what her brother says about picking up the car and the boys, he's got an answer for us; no proof, but an answer, none the less. Can he show you once that she acted with malice? Is there any one situation that doesn't have an innocent interpretation? No, he can't show you that she acted with malice. He can't. he doesn't have it. He doesn't have the proof. He's asking you folks to help him out and speculate. Can he show you that she had evil intentions? Can you actually believe that the mother of two boys is going to have malice toward another youngster? Of course, he's got an explanation for that, doesn't he? He says, "Well, you know (500) they're planning a robbery, they're

going to kill people and no one is going to be around. Okay, even given the fact that there's going to be a robbery, does that mean that they're going to call the police and say, "Look, this is your local numbers house, we've just been robbed." Not likely.

I think that the case as it was presented leaves a reasonable doubt. And when you return a verdict, it should be not guilty for Clarissa Marsh.

Thank you.

JURY INSTRUCTIONS

(April 23, 1979)

(3) Good morning, Ladies and Gentlemen of the Jury. The evidence and arguments in this case have been completed. I will now instruct you as to the law. Following the instructions I am about to give you, you will go to the juryroom to deliberate and decide on your verdict. But remember that you are sworn to deliberate and decide this case justly. Sympathy and prejudice must not interfere with your decision or influence your decision. It is my duty as Judge to instruct you on the law you are to apply to this case and it is your duty to follow the law as it is given to you.

From time to time you have already been given some instructions. You must consider all of my instructions as a connected series which together from the law that you are to apply to this case.

JURY INSTRUCTIONS

You should not pick out one or some instructions (4) and disregard others. It is your duty as Jurors to determine the facts. You are the sole and exclusive judges of the facts. You alone determine the weight, the effect and the value of the evidence, as well as the believability of the witnesses. You must consider and weigh the testimony of all witnesses and evidence. You alone are to determine whether to believe any witness or evidence and the extent to which any witness or evidence should be believed. Your decision as to any fact in this case is final.

Now, when we first started I told you that the case came to the Court because an Information was filed by the Prosecutor's Office. An Information is used to inform the Defendants, in this case Clarissa Marsh and Benjamin Williams, of the charges against them.

JURY INSTRUCTIONS

The Information in this case reads that on October 29th, 1978, at 12627 Mendota in the city of Detroit, that Walter Leslie Martin, Clarissa Marsh, and Benjamin Williams, while in the perpetration or attempted perpetration of a robbery, did kill and murder one Ollie Scott, contrary to Section 750.316, Michigan Compiled Laws Annotated. That's Count I.

Count II: While in the perpetration or attempted perpetration of a robbery, did kill and murder one Koran Knighton, contrary to Section 750.316, Michigan compiled Laws Annotated.

And Count III, did assault Cynthia Knighton with intent to murder with a certain weapon, to-wit a handgun, contrary (5) to Section 750.83, Michigan Compiled Laws Annotated, and against the peace and dignity of the People of the State of Michigan.

JURY INSTRUCTIONS

Now, at the time that I read that to you I also told you that the Defendants in this case were presumed innocent and that the burden was on the Prosecutor to prove them guilty beyond a reasonable doubt.

Now, basic to our system of criminal justice is that principle that a person accused of a crime is presumed to be innocent. This presumption of innocence started at the very beginning of this case and continues throughout the trial and during the deliberations. Each and every one of you must be satisfied beyond a reasonable doubt, after deliberating, that the Defendants are guilty before you can return a verdict of guilty. You must begin your deliberations with the presumption of innocence foremost in your minds.

The fact that the Defendants were arrested and are on trial is no evidence

against them. There must be evidence introduced in the trial that convinces you of the Defendants' guilt beyond a reasonable doubt. The law does not require a Defendant to prove his or her innocence or to produce any evidence whatsoever. The burden of proving guilt is upon the prosecution throughout the entire course of the trial and at no time does the burden of proof shift to the Defendants. This burden of proof means that every element of the crime charged must be proven by evidence beyond a reasonable doubt.

(6) A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence in this case, or growing out of any reasonable or legitimate inferences drawn from the evidence or the lack of evidence. It is not merely an imaginery (sic) doubt or a flimsy, fanciful doubt, or a doubt based upon the

mere possibility of the innocence of the Defendants, or a doubt based upon sympathy, but rather it is a fair, honest doubt based upon reason and common sense. It is a state of mind which would cause you to hesitate in making an important decision in your own personal life.

By stating that the Prosecution must prove guilt beyond a reasonable doubt, I mean there must be such evidence that causes you to have a firm conviction to a moral certainty of the truth of the charges here made against these Defendants. When you deliberate, you are only allowed to consider the evidence which has been properly admitted in this case. That means the testimony from the witness stand and the exhibits. Many things are not evidence and should not be considered as evidence. Evidence includes only the sworn testimony of witnesses, the exhibits and other facts

and testimony which the Court tells you to consider as evidence.

From time to time during the trial the Court has had to rule on motions or objections by Counsel. I must do so according to the law, and the rulings do not reflect any personal opinion about the facts in this case. Such rulings are not (7) evidence and you must not give any weight either to the rulings or to the number of rulings. Neither my comments nor my instructions are evidence and they should not be taken as any indication of the Court's opinion as to how you should decide this case.

If you have come to the belief during the course of the trial that the Court is telling you how to decide this case, you must disregard that opinion. You are the sole judges of the facts and you alone have the solemn duty and obligation to decide this case from the evidence. Any

statements or arguments of the attorneys are not evidence, but are only intended to assist you in understanding the evidence and the theory of each party. The questions which attorneys ask witnesses are not themselves evidence. It is the answers of witnesses which provide evidence. You should disregard anything said by an attorney which is not supported by the evidence or by your own general knowledge and experience. You should use your own general knowledge and experience in judging whether any particular evidence seems reasonable and probable. However, if you have personal knowledge of a particular place or event, you may not consider it, since this case must be decided only from the evidence which is shown during the trial.

In determining whether any fact has been proved, you should consider all of the evidence without regard to which

party produced the evidence.

Now, the evidence in this case is of two different (8) types. On the one hand, there is direct evidence, such as a statement by a witness about something he saw or heard himself, or an exhibit. If believed, direct evidence establishes that fact.

The other type of evidence is circumstantial evidence which does not prove a fact but which points to the existence of that fact. In this regard, if a witness were to tell you that he saw human footprints in freshly fallen snow, this, if believed, would point to the recent presence of a human being at that place. It is not necessary that every fact be proven directly by a witness or an exhibit. A fact may be proven indirectly by other facts and circumstances from which it usually and reasonably follows, according to common

experience. Such evidence is proof which can be used to prove that a certain fact existed.

Circumstantial evidence must be considered by the following rules: (a) The circumstances themselves must be believed: (b) The circumstances must be consistent with guilt and inconsistent with innocence; (c) The circumstances must be of such a conclusive nature and tenetcy (sic) that they convince you beyond a reasonable doubt of the Defendant's guilt. If the evidence is open to two reasonable constructions, one indicating guilt and the other innocence, it is your duty to accept the construction indicating innocence.

Now, you are the sole judges of the facts in this (9) case and must determine which witnesses you will believe and what weight you will give to their testimony. In doing so you may take into account the

witness's ability and opportunity to observe, the witness's memory, the witness's manner while testifying, age, any interest, bias or prejudice the witness may have, and the reasonableness of the witness's testimony considered in the light of all the evidence in the case.

If you will recall, at the start of this trial there was a stipulation that the attorneys agreed upon relative to the identity of Koran Knighton and Ollie Scott. As I told you at that time, a stipulation of fact is an agreed statement of facts between the attorneys. You may regard such stipulated facts as true.

The fact that a witness is a police officer does not give his testimony any greater or lesser weight than the testimony of any other witness. You as Jurors have the duty of weighing the

believability of the testimony of all witnesses and giving a witness's testimony such weight as you believe it deserves under all of the circumstances you have observed, and this includes the testimony of police witnesses. Such testimony is to be judged by the same standards as any other testimony.

Now, the Prosecution has introduced evidence of a statement which he claims was made by the Defendant Benjamin Williams. Before you may consider any such out-of-court statement as evidence against the Defendant Williams, you must determine (10) two things: First you must find that Defendant Williams in fact made the statement as it was given to you. Obviously, words said to be written or spoken by a defendant should not be used against him unless he actually spoke or wrote those words. Only so much of the statement as was actually made by a

defendant may be considered as evidence against him.

Second, if you determine that the statement was made by the defendant, then you must consider whether the statement or any part of it is true. You should consider the facts and circumstances surrounding the making of the statement along with all the other evidence in the case and judging its truthfulness and deciding how much weight, if any, the statement deserves. Should you accept the statement or any part thereof as true, you may then give it whatever weight you believe it deserves.

The statement of Co-Defendant Benjamin Williams has been admitted into evidence against him only. I caution you that it may be used only in considering the guilt or innocence of Defendant Benjamin Williams, under the rules already given to you, and must not be used or

considered in any way against Defendant Clarissa Marsh. To do so would be most unfair and in violation of the oath that you took as Jurors.

Now, every defendant in a criminal case has the absolute right not to testify. The defendant has no obligation to testify or to prove his innocence in any manner. You are not permitted to consider his silence in your deliberations, and his (11) silence must not influence your verdict in any manner whatsoever.

Defendant Clarissa Marsh took the stand to testify, and she had a right to take the stand and become a witness in her own behalf. It is your duty to consider her testimony by the same standards as you would that of any other witness who has appeared on the stand.

The Defendants in this case, in Count I and II of the Information as it has

been read to you, with the crime of Murder in the First Degree. The law, as it applies to this case, states that all murder which shall be committed during and as a result of the committing or attempting to commit robbery, shall be Murder of the First Degree. The defendants plead not guilty.

There are two kinds of murder, First Degree and Second Degree. You will be instructed as to both. Murder of either degree is the killing of one person by another with malice.

Malice is a term with special meaning in the law. Malice means that the defendant intended to kill or that he knowingly created a high risk of death with knowledge that it probably would result in death, and that he did so under circumstances which would not justify, excuse or lessen the crime. First Degree and Second Degree Murder are the same

crime, except that First Degree Murder has one more element. The additional element is that the death must have occurred as a direct result of the commission of the crime of robbery.

You will first be instructed on Murder of the (12) Second Degree. Keep in mind that all of the elements of Second Degree Murder are necessary to prove First Degree Murder. To establish Second Degree Murder the Prosecution must prove each of the following elements beyond a reasonable doubt:

First, that the deceased, Koran Knighton and Ollie Scott, died on or about October 29th of 1978, within the city of Detroit.

Second, that their deaths were caused by an act of the Defendants or because the Defendants consciously created a very high degree of risk of death to another with the knowledge that it probably would

cause death.

Third, if you find that the deaths wee caused by the Defendants you must determine whether the Defendants are guilty of any crime. The killing of one human being by another may be entirely innocent. It is not the act of killing in itself which makes it a crime, but the state of mind with which it is done.

Fourth, for Murder you must find that the Defendants consciously and knowingly performed the act which caused death. The Defendant must have either intended to kill, that is he must have done the act intending that it result in death or in great and serious bodily injury, or he must have knowingly created a very high risk of death with the knowledge that it probably would cause death. The degree of risk for murder must be so reckless and wrongful as to amount to a criminal purpose and against a (13) person's life,

and the Defendants must have been conscious of that risk.

For Murder in the First Degree, the Prosecutor must prove beyond a reasonable doubt the four elements of Second Degree Murder, which have been described to you. In addition, he must prove beyond a reasonable doubt the fifth element which raises the crime to First Degree Murder. Fifth, that at the time of the act which caused the deaths of Ollie Scott and Koran Knighton, the Defendants were committing or attempting to commit, or assisting another in the commission of the crime of robbery.

For the crime of Robbery, the Prosecution must prove each of the following elemen s beyond a reasonable doubt: First, that the Defendants assaulted Ollie Scott. An assault is an attempt or a threat with force and violence to do immediate bodily harm to

another by one who has the apparent present means of doing such harm.

Second, that at the time of such assault, the Defendant was armed with a dangerous weapon or with an article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon.

Third, that at the time of such assault the Defendants took the money or propert (sic) alleged to have been taken, money or property which did not belong to the Defendants.

Fourth, that this money was taken from the person or in the presence of Ollie Scott. The from his peron (sic) or in (14) his presence element is established by proof that violence or putting fear of violence was the means used to take away possession or control over the property.

Fifth, the property taken must have been of some value, but the extent of the

value makes no difference. The amount of money taken makes no difference.

Sixth, there must have been some movement of the property in order to make the crime complete. However, any movement of the property by anyone is enough. The property may have been moved by a confederate or a partner, by an innocent bystander or by the victim, if acting under the direction or order of the robber.

Seventh, at the time of the taking the Defendants must have intended to deprive Ollie Scott of the property taken.

With Robbery there are also the lesser included offenses of Attempt, and Assault With Intent to Rob Being Armed.

To establish an attempt, the Prosecutor must prove first that the Defendant intended to commit the crime of robbery, as has been described to you. Second, that the Defendants performed an

act toward committing a crime. Not every act is sufficient to constitute an attempt. In determining whether or not the Defendants performed an act sufficient to constitute an attempt, it is necessary to distinguish between mere preparation, on the one hand, and the actual start of the doing of the criminal deed on the other. Mere preparation, which may consist of (15) planning the offense or of doing some act which may (be) innocent in itself is not enough. However, if the act or acts of the Defendant can lead only to one end, that is that they cannot within reason be regarded as pointing to any other purpose than the commission of the crime charged here, then they constitute an attempt. Such end must be clearly indicated beyond a reasonable doubt.

As to the lesser included offense of Assault With Intent to Commit Robbery

JURY INSTRUCTIONS

Being Armed, first the Prosecution must prove beyond a reasonable doubt that the Defendant assaulted Ollie Scott. An assault is an attempt or threat with force and violence to do immediate bodily harm to another by one is (sic) has the apparent present means of doing such harm. Second, that at the time of such assault the Defendant was armed with a dangerous weapon or an article used or fashioned in a manner to give reason to believe that it is a dangerous weapon. Third, that at the time of such assault the Defendants intended to rob and steal. Robbery occurs when a person assaults another and takes money or property from his or her person or in his or her presence intending at the time to deprive that person of the property. It is not necessary in a charge of Assault With Intent to Rob that the crime of robbery be completed or that the Defendant had

actually taken any money or property. However, there must be proof beyond a reasonable doubt that at the time of the assault the Defendant intended to commit the crime of robbery.

(16) Also, with regard to aiding and abetting, for First Degree Murder, the Defendant must have been either committing or assisting another in the commission of the crime of robbery, that has just been defined to you.

Now, it is charged in this case that Benjamin Williams and Clarissa Marsh either directly committed the crime charged, which is robbery, or that they intentionally aided or assisted another in the commission of that crime. All persons who aid or assist in the commission of a crime are as liable as if they directly committed the crime and can be convicted of the principle offense as an aider and abettor.

JURY INSTRUCTIONS

The Defendants Benjamin Williams and Clarissa Marsh are charged with First Degree Murder in the course of committing a robbery. Before you may convict you must be convinced beyond a reasonable doubt, first that the Defendants intended to commit the crime of robbery at the time of giving the aid or encouragement.

Second, that the Defendants performed acts or gave encouragement which aided or assisted the commission of the crime of robbery either before or at the time of the commission of the crime.

Third, that the crime of First Degree Murder occurred as a result of this robbery.

Fourth, that this crime which occurred was fairly within the criminal plan and the Defendants might have expected (17) this to happen in the course of committing this robbery.

For Murder in the First Degree there

must be proof beyond a reasonable doubt that the killing occurred as a result of the crime of robbery and that the Defendants were at the time engaged in committing or attempting to commit or aiding another in the commission of that crime.

Now, as I indicated to you in the instruction, malice is one of the elements of murder. If you find that the Defendants consciously committed or attempted to commit or assisted another in the commission of a robbery knowing that a very high risk of death or knowledge that that would probably cause death.

In Count III of the Information the Defendants are charged with Assault With Intent to Commit Murder. Any person who shall assault another with intent to commit the crime of murder is guilty of this crime. The Defendant pleads not

guilty to this charge.

To establish this charge the Prosecution must prove each of the following elements beyond a reasonable doubt.

First, that the Defendants assaulted Cynthia Knighton. An assault is an attempt or threat with force and violence to do immediate bodily harm to another by one who has the present means of doing such harm.

Second, that at the time of committing such assault, (18) the Defendants intended to murder the Complainant. Murder is the killing of one person by another with malice.

As I indicated to you, Malice is a term with special meaning in the law. Malice means that the Deferdants intended to kill or consciously created a very high degree of risk of death with knowledge of the probable consequences of

the act, and that this was done so under circumstances which did not justify, excuse or mitigate the crime.

When a certain intent is a necessary element in a crime, the crime cannot have been committed when the intent did not exist. Intent is a decision of the mind to knowingly do an act with a conscious objective of accomplishing a certain specific result. There can be no crime of robbery under our law where there is no intent to deprive a person of his property. There can be no crime of felony murder in the first degree where there is no intent to rob. There can be no assault with intent to rob where there is no intent to rob. There can be no crime of attempt robbery armed where there is no intent to rob. And there can be no crime of assault with intent to murder where there is no intent to kill; and the burden rests upon the Prosecution

to show beyond a reasonable doubt that the Defendants, at the time of doing the alleged acts, had the wrongful intent with regard to each of those specific crimes.

The intent with which a person does an act is known by the way in which he expresses it to others or indicates (19) it by his conduct. The intent with which a person does an act can sometimes be determined from the manner in which it is done, the method used, and all other facts and circumstances, but only if that intent is established by the evidence.

Now, in this case Clarissa Marsh, it is claimed that her actions were caused by the threatening conduct of another. This defense is called duress. Clarissa Marsh is not guilty if she committed this offense as a result of such threatening conduct and under the following conditions.

JURY INSTRUCTIONS

First, the threatening conduct must have been sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm.

Second, the conduct must have in fact caused such fear of death or serious bodily harm in the mind of the Defendant.

Third, the fear or duress must have been operating on the mind of the Defendant at the time of the alleged act.

Fourth, the Defendant must have committed the act to avoid the threatened harm.

Fifth, the situation must have arisen without the fault or negligence of the Defendant.

In determining whether the fear or duress was operating upon the Defendant at the time of the alleged act, you should carefully consider all the surrounding circumstances as disclosed by the evidence. Consider the nature of the

threats, or force, if you should find such threats or force to have been (20) made. Consider the background and character of the person making the threats or using the force. Consider the situation of the Defendant at the time she committed the alleged act. Consider whether she had the opportunity or ability to avoid the feared harm without committing the alleged act. In this regard you should also consider the reasonableness of any other course of action in view of all the circumstances which were known to the Defendant at the time.

Now, there was some evidence of duress introduced in this trial. It then becomes the duty of the Prosecution to prove beyond a reasonable doubt that the Defendant was not acting under duress at the time the offense was committed. If the evidence or lack of evidence or the

unsatisfactory nature of the evidence raises a reasonable doubt as to whether the Defendant was acting under duress, then you must find the Defendant not guilty.

If you find that the Defendant, for any reason whatsoever, did not consciously or knowingly act with the intent to rob, the crime cannot have been committed and you must find the Defendants not guilty of the crime of First Degree Murder.

If, from all of the evidence, you have a reasonable doubt as to whether or not the Defendants knowingly and consciously acted with the intent to rob, then you must find the Defendants not guilty of the crime of First Degree Murder.

With regard to Count III, if you find that the Defendants for any reason whatsoever did not consciously or (21) knowingly act with the intent to kill,

the crime cannot have been committed and you must find the Defendants not guilty of the crime of Assault With Intent to Commit Murder.

If, from the evidence, you have a reasonable doubt as to whether or not the Defendants knowingly and intentionally acted with intent to kill, then you must find the Defendants not guilty of the crime of Assault With Intent to Commit Murder.

Now, a gun is a dangerous weapon. You may infer an intention to kill from the use of a dangerous weapon when it is used in such a manner that the death of a person is plainly likely. You may infer that the person intends the usual results which follow the use of a dangerous weapon. You must consider all of the facts and circumstances in determining the state of mind of the Defendants at the time of the act. This may be

inferred from the kind of weapon used, the nature of the wounds inflicted, the circumstances surrounding the killing and the assault, the acts, conduct and language of the accused, with any other circumstances in evidence, in determining whether a person who has killed another is guilty of murder, the nature and extent of the injury or wrong which was actually intended, must usually be of controlling importance. There cannot be a conviction of murder unless the injury intended was one of very serious character which might naturally and commonly involve loss of life or grievous mischief.

If all of the evidence does not convince you beyond (22) a reasonable doubt that the Defendants either intended to kill or consciously created a very high degree of death with knowledge of the probable consequences, then you must

find the Defendants not guilty of the crime of murder.

If you find the Defendants guilty of murder, then it is your duty to state in your verdict whether the Defendants are guilty of Murder in the First Degree or guilty of the lesser offense of Murder of the Second Degree.

The evidence in this case must also convince you beyond a reasonable doubt that the crime occurred on or about October 29th, 1978, within the city of Detroit.

Now, Clarissa Marsh and Benjamin Williams are both on trial in this case. The fact that they're on trial together is no evidence of their association together or of their guilt. Each Defendant is entitled to a separate and individual consideration of his or her case. In considering the evidence, you are to carefully examine it as to each

JURY INSTRUCTIONS

Defendant, as if he or she were on trial alone. You are to consider each instruction given as applying separately and individually to each Defendant unless I tell you otherwise.

When you deliberate you must analyze the evidence as it applies to each individual Defendant. Each Defendant is entitled to have his or her case determined from evidence as to his or her own acts and statements and conduct and any other evidence which may apply to him or her.

(23) The Prosecutor must prove each and every element of the crime beyond a reasonable doubt as to each Defendant.

It is the People's theory of this case that on October 29th, 1978, the Defendants Clarissa Marsh and Benjamin Williams planned to rob Mrs. Ollie Scott, with the help of Kareem Martin; that the three drove to 12627 Mendota in the city

of Detroit at approximately 7:00 p.m.; that the Defendant Marsh and Kareem Martin entered the home first and that when Kareem Martin pulled a gun, Clarissa Marsh took a position by the door as a lookout; that Defendant Williams was allowed in to the house by Defendant Marsh, and he and Kareem Martin proceeded to rob Mrs. Scott; that after they had obtained all they could from Mrs. Scott, Kareem Martin and Defendant Williams took Mrs. Scott and Cynthia Knighton and Koran Knighton down in to the basement; that Kareem Martin then executed Mrs. Scott, Koran Knighton and Cynthia Knighton, however Mrs. Knighton lived; that the shootings were within the scope of the robbery and were planned by the Defendants to eliminate any witnesses to the robbery. Wherefore, Defendant Clarissa Marsh and Defendant Benjamin Williams are each guilty in Count I of

Murder in the First Degree, and Count II of Murder in the First Degree, and in Count III of Assault With Intent to Murder.

Defendant Clarissa Marsh has also a theory of her case; that is on Sunday, October 29th of 1978, Clarissa Marsh proceeded to 12627 Mendota in the city of Detroit in the company (24) of two men. Miss Marsh believed she was going to borrow money from Ollie Scott, a former co-worker of Miss Marsh, who has loaned money to Miss Marsh before. Kareem Martin insist that he accompany her to make sure that she did attempt to borrow the money from Mrs. Scott. Once they arrived at the Mendota address, Mr. Martin produced a gun and announced a holdup. Miss Marsh did not have a weapon and had no prior knowledge that Martin was armed or that a robbery was planned. Miss Marsh, feeling coerced and with no

immediate avenue of escape, just stood by the front door while others ransacked the house. When the victims were ordered in to the basement of the house, Miss Marsh stood at the front door, made her escape, and taking nothing with her which belonged to the Mendota address. Hearing of the murders at the Scott residence via the next day's news, Miss Marsh made arrangements with a lawyer to turn herself in to the police. She did in fact voluntarily present herself at Detroit Police Headquarters on Monday evening, October 30th of 1978, and was placed under arrest.

Now, the Defendants are charged with three counts; that is, with the crime in Count I of First Degree Murder, in Count II, First Degree Murder, and in Count III, with Assault With Intent to Murder. These are separate crimes and the Prosecutor is charging that each

Defendant committed all of them. The fact that the Defendants are being charged with more than one crime is no evidence against them. Each charge must be con- (25) sidered separately in light of all the evidence in the case. You must return an individual verdict for each Defendant.

You may return a verdict of guilty of one or more of the crimes charged, or not guilty, according to the individual determination which you make for each person on trial.

As to Count I, you may also consider whether or not the Defendants are guilty or not guilty of Robbery Armed, Assault With Intent to Rob Being Armed, or Attempt Robbery Armed.

MR. KRISCIUNAS: Your Honor, may we approach the Bench?

THE COURT: Yes, you may.

(Side bar discussion.)

JURY INSTRUCTIONS

THE COURT: Also, Ladies and Gentlemen of the Jury, with regard to aiding and abetting, it does not matter how much aid, advice or encouragement was given, however, you must find that the Defendants intended the commission of the crime and that the aid, advice or encouragement the Defendants gave did in fact aid, advise or encourage in the commission of a crime. Mere presence, even with knowledge that an offense is planned or being committed, is insufficient to establish that the Defendants aided or assisted in the commission of the crime.

Now, in this case as to Count I there are six possible verdicts. As to Count II, there are three possible verdicts. And as to Court III, there are two possible verdicts.

As I indicated to you, each Defendant's case must (26) be considered

separately. The possible verdicts in Count I are not guilty; Guilty, Murder in the First Degree; Guilty, Murder in the Second Degree; Guilty of Robbery Armed; Guilty of Assault With Intent to Rob Being Armed; or Guilty of Attempt Robbery Armed.

As to Count II, you may return only one verdict on that count -- there are three possible verdicts -- Not Guilty; Guilty of Murder in the First Degree, Felony Murder; or Guilty of Murder in the Second Degree.

As to Count III, there can only be one verdict; there are two possible verdicts: Not Guilty, or Guilty of Assault With Intent to Commit Murder.

When you go into the juryroom you will be given verdict forms. After you have deliberated and decided upon a verdict you can mark on the jury form what your verdict is, but keep it with you until

such time as you come back into the courtroom as a group.

The possible verdicts are set forth in the verdict forms which I told you you will receive. Only one of the possible verdicts may be returned by you as to any one particular count. You may return different verdicts for each Defendant, but each Defendant is entitled to your individual determination as to his or her guilt or innocence as to any count. If you all have agreed upon one verdict for each Defendant as to each count, your foreman should mark that verdict. The other verdicts are to be left (27) unmarked. But when you go to the juryroom your deliberations should be conducted in a businesslike manner. You should first select a foreperson and she or he should see to it that the discussion goes forward in a sensible and orderly fashion and that each Juror has

the opportunity to discuss the issues fully and fairly. A verdict in a criminal case must be unanimous.

In order to return a verdict it is necessary that each of you agree upon that verdict. In the juryroom you will discuss the case among yourselves, but ultimately each of you will have to make up your own mind. Any verdict must represent the individual considered judgment of each Juror.

It is your duty to consult with your fellow Jurors and to deliberate with a view toward reaching an agreement, if you can do so without violating your own judgment. Before deciding the case give impartial consideration to the views of your fellow Jurors. This means that you should give respectful consideration to one another's views and talk over differences of opinion in the spirit of fairness and frankness. It is natural

that differences of opinion will arise. When they do, each of you should not only express your opinion, but also the facts and reasons upon which you base it. By reasoning the matter out it is often possible for all the Jurors to agree.

In the course of your deliberations do not hesitate to re-examine your own views and change your opinion if you are convinced that it is wrong. However, none of you should surrender (28) your honest conviction as to weight and affect of the evidence or lack of evidence solely because of the opinion of your fellow Jurors or for the mere purpose of returning a verdict.

Do not concern yourselves in your deliberations with what the penalty might be if you should find the Defendants guilty. The question of guilt and the question of penalty are decided separately. It is the duty of the Judge

to fix the penalty whenver (sic) a defendant is found guilty. Possible penalty should not influence your decision.

If you wish to communicate with the Court while you are deliberating, please have your foreperson write a note and deliver it to the Bailiff. It is not proper to talk directly with the Judge, attorneys, court officers or other persons involved in the case, even if the discussion does not have to do with the case.

During your deliberations you must not disclose the state of your deliberations to others outside the juryroom. Therefore, unless you reach a verdict do not disclose this information even in the courtroom.

If you wish to examine more closely the exhibits which have been admitted into evidence while you are deliberating,

please have your foreperson write a note and deliver it to the Bailiff. The exhibits will then be given to you and you may examine them in the juryroom.

Now, if you wish to communicate with the Court and (29) hand the Bailiff a note, you knock on the door, the Bailiff will answer and take the note from you; is that clear?

Gentlemen, may I see you please.

(Side bar discussion.)

THE COURT: Ladies and Gentlemen, at this time I'll ask you to step into the juryroom, but do not begin your deliberations until you are told to do so.

(Whereupon, at 10:08 o'clock a.m., Jury excused from courtroom.)

THE COURT: Any additions to the charge?

MR. KRISCIUNAS: The People are satisfied with the charge, Your Honor.

JURY INSTRUCTIONS

MR. HILL: Defendant Williams is satisfied with the charge.

MR. WALKER: Clarissa Marsh is satisfied with the charge as given, your Honor.

THE COURT: Is it okay for them to begin deliberating?

MR. HILL: It's okay as to Defendant Williams.

MR. KRISCIUNAS: Yes, your Honor.

MR. WALKER: Yes, your Honor.

THE COURT: I'm also going to give them the verdict forms at this time.

Have the Jurors come back out, please.

(Whereupon, at 10:12 o'clock a.m., Jury returned to courtroom.)

(30) THE COURT: Do Counsel stipulate all the members of the Jury are in their respective places?

MR. KRISCIUNAS: Yes, your Honor.

MR. HILL: Defendant Williams so stipulates.

JURY INSTRUCTIONS

MR. WALKER: Clarissa Marsh so stipulates, your Honor.

THE COURT: Ladies and Gentlemen of the Jury, the verdict forms you have been given are given to you to assist you in your deliberations. You are not bound to use them, and if you wish to write your verdict on a separate piece of paper and hand it to the Bailiff, you are perfectly free to do so. I wanted that to be made clear to you. If you wish to use these, you may; is that clear?

At this time will you please go back into the juryroom but do not begin your deliberations until you are told to do so.

(Whereupon, Jury excused from courtroom at 10:13 o'clock a.m.)

THE COURT: Gentlemen, anything further?

MR. HILL: Nothing further on behalf of Defendant Williams, your Honor.

JURY INSTRUCTIONS

THE COURT: Are you satisfied, Mr. Hill, with the charge and the instructions?

MR. HILL: I am, yes.

THE COURT: Mr. Walker?

(31) MR. WALKER: Yes, your Honor.

THE COURT: Mr. Krisciunas?

MR. KRISCIUNAS: The People are satisfied.

THE COURT: May the Jury begin their deliberations?

MR. HILL: Yes, your Honor.

MR. KRISCIUNAS: Yes, your Honor.

MR. WALKER: Yes, your Honor.

(Whereupon, Officer Caldwell sworn by Court Clerk.)

THE COURT: Thank you.

(Whereupon, at 10:15 o'clock a.m., Jury began deliberations.)

MR. KRISCIUNAS: Your Honor, in the event that the attorneys are not here and the Jurors should request any of the

exhibits, I have no objection to the Bailiff handing all the exhibits over to the Jurors without my being present.

MR. HILL: I would join in that, too, and would have no objection in my absence if the Jury requested certain exhibits that were allowed in evidence, or other things allowed in evidence.

THE COURT: Thank you, Mr. Hill.

MR. WALKER: I would concur in that, your Honor, but I will make myself available throughout the day.

THE COURT: Okay. If you'll let by Clerk know where you'll be, gentlemen.

* * *

(32)(Jury excused for luncheon recess at 12:47 o'clock p.m., and resumed deliberations at 2:00 o'clock p.m.)

THE COURT: The record should reflect that the Court has received a note from the Jury which reads, "We need more

clarification on Murder First Degree, Murder Second Degree and Robbery Armed. Can the Judge explain this again."

In discussing the matter with Counsel, the conclusion of all Counsel is that the instruction on Murder First Degree, Murder Second Degree should be read to them again, if that is in fact what they want, and that Robbery Armed and Attempt Robbery Armed should also be explained, as those would be the felonies that they would be concerned with in the First Degree Murder charge.

Is that correct, Gentlemen?

MR. HILL: Or that they must find that a robbery or attempt robbery was committed before they can even get to the question of whether there was a first degree or second degree murder?

THE COURT: Right. I think the instructions are pretty clear on that.

MR. HILL: I think they are, too, but

they didn't understand them, and that's something else.

THE COURT: But what I don't want to do is go over (33) the entire charge again. Are you ready for the Jury? We can have them come out and ask them specifically what they want.

(Whereupon, at 3:02 o'clock p.m., Jury returned to courtroom.)

THE COURT: Do Counsel stipulate the members of the Jury are present and in their respective places?

MR. KRISCIUNAS: The People so stipulate, your Honor.

MR. HILL: Defendant Williams so stipulates.

MR. WALKER: Defendant Clarissa Marsh so stipulates.

THE COURT: Ladies and Gentlemen of the Jury, I have a note from you which indicates you need more clarification of Murder First Degree, Murder Second Degree

and Robbery Armed; is that correct: Who will speak for you?

FOREMAN SHOEFELD: We would like to hear the explanation of the counts that have been given for us to deliberate on for each of the Defendants.

THE COURT: That is you want to know what the law is relative to Murder in the First Degree, Murder in the Second Degree and Robbery?

FOREMAN SHOEFELD: Yes.

THE COURT: I'll read those instructions to you again.

Counsel, would you approach the Bench for just a (34) second, please.

(Side bar discussion.)

THE COURT: The law, as it applies to this case, states that all murder which shall be committed during and as a result of the committing or attempting to commit robbery, shall be murder in the first degree.

JURY INSTRUCTIONS

The Defendants plead not guilty.

There are two counts of murder, First Degree and Second Degree. You will be instructed as to both. Murder of either degree is the killing of one person by another with malice.

Malice is a term with special meaning in the law. Malice means that the defendant intended to kill or that he knowingly created a very high risk of death with knowledge that it probably would result in death, and that he did so under circumstances which would not justify, excuse or lessen the crime.

First Degree and Second Degree Murder are the same crime, except that First Degree Murder has one more element. The additional element is that the death must have occurred as the direct result of the commission of the crime of robbery.

You will first be instructed on Murder of the Second Degree. Keep in mind that

all of the elements of Second Degree Murder are necessary to prove First Degree Murder.

To establish Second Degree Murder, the Prosecution must prove each of the following elements beyond a reasonable doubt: (35) First, that the deceased died on or about October 29th, 1978, within the city of Detroit.

Second, that the deaths were caused by acts of the Defendants or that the Defendants consciously created a very high degree of risk of death to another with the knowledge that it probably would cause death.

Third, if you find that the deaths were caused by the Defendants, you must determine whether the Defendants are guilty of any crime. The killing of one human being by another may be entirely innocent. It is not the act of killing in itself which makes it a crime, but the

state of mind with which it is done.

Fourth, for Murder, you must find that the Defendants consciously and knowingly performed the act which caused death. The Defendants must have either intended to kill, that is they must have done the act intending that it result in death, or great and serious bodily injury, or they must have knowingly created a very high risk of death with the knowledge that it probably would cause death. The degree of risk for murder must be so reckless and wrongful as to amount to a criminal purpose aimed against a person's life and the Defendants must have been conscious of that risk.

For Murder of the First Degree, the Prosecutor must prove beyond a reasonable doubt the four elements of Second Degree Murder which have been described to you. In addition, he (36) must prove beyond a reasonable doubt the fifth element which

raises the crime to First Degree Murder.

Fifth, that at the time of the act which caused the deaths of Ollie Scott and Koran Knighton, the Defendants were committing, attempting to commit, or assisting another in the commission of the crime of robbery.

For the crime of robbery, the Prosecution must prove each of the following elements beyond a reasonable doubt.

First, that the Defendant assaulted Ollie Scott. An assault is an attempt or a threat with force and violence to do immediate bodily harm to another by one who has the apparent present means of doing such harm.

Second, that at the time of such assault the Defendant was armed with a dangerous weapon or with an article used or fashioned in a manner to lead the person so assaulted to reasonably believe

it to be a dangerous weapon.

Third, that at the time of such assault Defendants took the money or property alleged to have been taken, money or property which did not belong to the Defendants.

Fourth, that this money was taken from the person or in the presence of Ollie Scott.

The from his person or in his presence element is established by proof of violence or putting in fear of violence being used to take possession or control over the property.

Fifth, the property taken must have been of some (37) value, but the extent of the value makes no difference. The amount of money taken makes no difference.

Sixth, there must have been some movement of the property in order to make the crime complete. However, any

movement of the property by anyone is enough.

Seventh, at the time of the taking the Defendants must have intended to deprive Ollie Scott of the property taken.

Robbery Armed also includes the lesser included offense of Attempt Robbery Armed. To establish an attempt, the Prosecution must prove first that the Defendants intended to commit the crime of robbery.

Second, that the Defendants performed an act toward committing that crime. Not every act is sufficient to constitute an attempt. In determining whether or not the Defendant performed an act sufficient to constitute an attempt, it is necessary to distinguish between mere preparation on the one hand, the actual start of the doing of the criminal deed on the other. Mere preparation, which might consist of planning the offense, or doing some act

which might be innocent in itself, is not enough. However, if the act or acts of the Defendants can lead only to one end, that is they cannot within reason be regarded as pointing to any other purpos- than the commission of the crime charged here, then they constitute an attempt. Such end must be clearly indicated beyond a reasonable doubt. The Defendants must have been either committing or assisting another in the commission of the crime. (38)

If you find that the Defendants consciously intended to commit, attempt or assist another in the crime of Robbery, you may infer that he knowingly created a very high risk of death with knowledge that it probably would cause death.

Is that sufficient for which you --

FOREMAN SHOEFELD: Yes.

THE COURT: At this time you may

return to the juryroom to continue your deliberations.

(Whereupon, at 3:10 o'clock p.m., Jury returned to juryroom to continued deliberations.)

MICHIGAN COURT OF APPEALS OPINION

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

CLARISSA MARSH and BENJAMIN WILLIAMS

Defendants-Appellants.

Dated Dec. 17, 1980
Docket Nos. 45451; 46128

BEFORE: R.M. Maher, P.J., and Bronson and T.C. Quinn, JJ.

PER CURIAM

Defendants were both convicted after a joint jury trial of two counts of first-degree felony murder, MCL 750.316; MSA 28.548, and one count of assault with intent to murder, MCL 750.83; MSA 28.278. They were both sentenced to life imprisonment on each of the first-degree felony murder convictions and both were also sentenced to prison terms of from 60 to 90 years on the assault convictions. The defendants appeal by right and their

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appeals have been consolidated.

Both defendants argue that the trial court erred in denying their motions for directed verdicts. They first argue that the trial court erred in applying the "any evidence" standard. Well after the trial in the instant case, the Supreme Court rejected the "any evidence" standard and held instead that the trial court, when ruling on a directed verdict motion, must consider the evidence presented by the prosecution up to time the motion is made, view the evidence in the light most favorable to the prosecution, and then determine whether a rational trier of fact could find the essential elements of the offense proven beyond a reasonable doubt. People v Hampton, 407 Mich 354, 368; 285 NW2d 284 (1979). We need not address the question of whether Hampton applies, because even under Hampton's broader standard the

evidence was sufficient to survive the directed verdict motion.

With regard to defendant Williams and the felony murder charges, he argues that there was an insufficient showing that a robbery or attempted robbery took place, so that the element of an underlying felony was absent. We disagree. The evidence showed that when Williams entered the house he was armed and asked "where's the money". His statement to the police, which was introduced into evidence during the prosecution's case-in-chief, indicated that the (sic) had discussed a robbery with Kareem Martin before arriving at Ollie Scott's house, and that he helped Martin collect two bags of money from the upper level of the house where Scott had been taken at gunpoint. One of the victims, Cynthia Knighton, testified she heard the sound of drawers being opened and closed while

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Williams was upstairs. Officer Porter testified that the house appeared to have been ransacked. This was sufficient, when viewed in the light most favorable to the prosecution, to justify a reasonable trier of fact in finding that a robbery or attempted robbery took place.

Williams also argues his motion for directed verdict should have been granted as to the murder charges because the prosecution did not meet its burden on the element of malice. A split of opinion still exists on this Court over the issue of whether, in a felony-murder case, malice may be imputed from the underlying felony or merely inferred from the circumstances surrounding the killing, including the underlying felony. See, e.g, People v Till, 80 Mich App 16; 263 NW2d 586 (1977), People v Fountain, 71 Mich App 491; 248 NW2d 589 (1976),

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Sidney, The Felony Murder Doctrine in Michigan, 25 Wayne L Rev 69 (1978), Saltzman, Does Michigan Have a Felony Murder Rule, 59 Mich Bar J 97 (1980). [1] We believe Fountain presents the better view and hold that malice may not be imputed, as a matter of law, from the underlying felony. Accordingly, the evidence presented at the time of the motion had to sufficiently show that Williams acted with the intent to kill or in reckless disregard of a known and high degree of risk that death or serious bodily harm might occur. [2] People v Langston, 86 Mich App 656, 660; 273 NW2d 99 (1978). See People v Hicks, 88 Mich App 675, 677 fn 1; 279 NW2d 45 (1979), held in abeyance, 406 Mich 984 (1979). We believe the evidence was sufficient. Taken in the light most favorable to the prosecution, the evidence showed that Williams knowingly participated in an

armed robbery. He ordered Knighton and her son to lie on the floor. In addition, Knighton testified that Williams ordered her and her son into the basement, where the shottings (sic) took palce (sic), and that Martin told Williams "We're going to have to hurt them". Although there was other evidence to the contrary, we believe the evidence was sufficient for the case to survive a motion for directed verdict.

Williams makes a similar argument with regard to the assault charge, claiming that the evidence was insufficient on the element of his intent to murder. The evidence showed defendant knowingly participated in a robbery and was informed that the victims might have to be harmed. There was also evidence to show he aided Martin in bringing the assault victim, Knighton, into the basement and that he knew Martin intended

to "hurt" her. Williams' statement indicated that when Martin picked him up Martin informed him that after the robbery they would have to "take them out". This was sufficient to show that Williams aided and abetted Martin with the knowledge that Martin had the specific intent to murder Knighton. People v Fields, 64 Mich App 166, 173-174; 235 NW2d 95 (1975), lv den 397 Mich 861 (1976).

Defendant Marsh raises substantially similar arguments in her appeal. As to the felony murder charges, she argues the evidence was insufficient to show a robbery or attempted robbery took place. Even without Williams' statement, which is inadmissible as to Marsh, we believe the evidence was sufficient to show the underlying felony. Knighton testified that when Marsh and Martin entered the house Martin pulled out a gun. Williams

was admitted shortly thereafter by Marsh, and he also had a gun. When Williams entered the house, he asked "where's the money". Martin took Scott upstairs, and was soon joined by Williams. Knighton then heard the sound of drawers and doors being opened and closed. When the trio came back downstairs, Marsh was given a paper bag with something in it. Officer Porter testified that two of the upstairs bedrooms had been ransacked. While he also testified that he found a box upstairs containing money and savings bonds, we believe the evidence was sufficient. Additional evidence of Marsh's participation in the robbery was established through testimony that she appeared to be standing guard by the door, opening the door for Williams, and through testimony that she blocked Knighton's attempted escape from the house.

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On the issue of malice, we believe the circumstances surrounding the apparent robbery were sufficient to establish malice for purposes of meeting a directed verdict motion. The evidence indicated that Marsh knowingly participated in an armed robbery in reckless disregard of circumstances that indicated a high degree of risk that death or serious bodily harm could result. See People v Langston, supra, 661.

As to the assault charge, the issue is whether the evidence was sufficient to show that Marsh aided and abetted the assault with the specific intent to murder Knighton, or with the knowledge that Martin had this specific intent. People v Fields, 64 Mich App 166, 173-174; 235 NW2d 95 (1975), lv den 397 Mich 861 (1976). This intent may be inferred from circumstantial evidence. Id. Marsh's case presents a much closer

question on this issue than does Williams'. There was no testimony indicating she harbored an intent to murder Knighton, nor was there any showing that she heard Martin's statements regarding the need to "hurt" or "take out" the victims. There was, in addition, no testimony placing her in the basement, the scene of the shootings. The evidence does indicate, viewed in the light most favorable to the prosecution, that she was aware that Williams and Martin were armed, that she served as a guard or "lookout" at the door, that she prevented an attempted escape by Knighton, and that she was given the paper bag thought to contain the proceeds of a robbery. The evidence also indicates that Marsh knew Scott, supporting the inference that it was Marsh who allowed Martin to gain entrance. While it is a close question, we believe the evi-

dence presented at the time of the motion was sufficient to survive a motion for directed verdict. This case is similar to People v Poplar, 20 Mich App 132, 139-140; 173 NW2d 732 (1969). In Poplar, the defendant allegedly acted as a lookout while two companions, whom he knew to be armed, broke into a civic recreation building. The two were discovered by the manager of the building, who was then shot in the face with a shotgun. The defendant was convicted of assault with intent to murder and on appeal alleged that the trial court erred in denying his motion for directed verdict. [3] The Poplar court noted that there was no evidence that the defendant harbored an intent to murder. It was held, however, that the jury could infer from the fact that defendant knew his companions were armed that defendant also knew they might use

the gun in attempting to murder someone if they were discovered. A similar analysis may be applied to the instant case. Marsh knew that both Williams and Martin were armed. She helped them to gain entrance, served as a lookout, and prevented Knighton from escaping. From these facts, along with the other facts and circumstances adduced prior to the motion, the jury might infer that Marsh also knew ~~that~~ Martin had the specific intent to murder Knighton.

By way of supplemental briefs, the defendants argue that the trial court erred in instructing the jury on felony murder by removing the element of malice from the jury's consideration. As noted above, although a split exists in this Court on this precise issue we believe People v Fountain, supra, presents the better view. Accordingly, the trial court must instruct the jury that malice,

express or implied, must be proven by the prosecution beyond a reasonable doubt before a defendant may be convicted of felony murder. The element of malice may not be imputed, as a matter of law, from the underlying felony. Once a common-law (second-degree) murder is established, the underlying enumerated felony serves to elevate that murder to murder in the first degree. See footnote 2, supra.

In the instant case, the trial court instructed that murder is the killing of one person by another with malice. The court then defined malice, both express and implied. The jury was then instructed that first-degree murder required an additional element, namely that at the time of the act which caused the deaths the defendants were committing or attempting to commit the crime of robbery. The trial court instructed the jury on the elements of a robbery, of

certain lesser included offenses of robbery, and on the law of attempts. Instructions were also given on aiding and abetting. At this point, the trial court gave the instruction that is specifically challenged on appeal:

> "For Murder in the First Degree there must be proof beyond a reasonable doubt that the killing occurred as a result of the crime of robbery and that the Defendants were at the time engaged in committing or attempting to commit or aiding another in the commission of that crime." (Emphasis added.)

Defendants argue that because this instruction refers to a killing in the course of a felony, rather than to a murder, the element of malice was removed from the jury's consideration. We disagree. The instruction is not incorrect as far as it goes. It is true that "[f]or murder in the First Degree there must be proof beyond a reasonable doubt that the killing occurred as a result of" an underlying felony. In

addition, there must be proof of malice and the trial court adequately instructed the jury on this point. Indeed, immediately following the challenged instruction the trial court reminded the jury that malice is an element of murder. If the trial court had instead instructed that murder in the first degree is completely established on proof of a killing in the course of an enumerated felony then the trial court's instructions would have been conflicting. Given, however, the trial court's extensive references to the necessity of malice and the fact that the challenged instruction is not incorrect, the instructions were not inconsistent and were correct when read as a whole. People v Beard, 78 Mich App 636; 261 NW2d 27 (1977) lv den 402 Mich 930 (1978).

Defendant Marsh argues she was denied her constitutional right to confrontation

by the admission of codefendant Williams' statement when Williams did not take the stand. The United States Supreme Court has held that a defendant's Sixth Amendment confrontation right is violated when the statement of a non-testifying codefendant which incriminates the defendant is admitted in a joint trial. Bruton v United States, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). In the instant case, the statement was "Brutonized" by the deletion of any references to Marsh. The statement was read to the jury without any gaps, and without any mention of Marsh. In addition, the trial court instructed that the statement was not evidence against Marsh. [4] Nevertheless, Marsh argues that the other evidence presented at trial, including her own testimony, linked her as closely to the substance of the statement as she would have been if

the references to her participation had not been deleted.

Elimination of references to a defendant has long been an accepted method of eliminating the problems raised in Bruton. E.g., People v Macklin, 46 Mich App 297, 302; 208 NW2d 62 (1973), lv den 393 Mich 764 (1974). As edited, the statement in this case satisfied Bruton and was admissible. United States v Belle, 593 F2d 487, 493 (CA 3, 1979).

Defendant Williams argues the trial court erred in refusing to suppress evidence of Knighton's identification of him pursuant to a counseless photographic display conducted at the hospital while he was in custody.

Subject to certain exceptions, a photographic identification procedure should not be used when a defendant is in custody and available for a line-up. When the circumstances warrant the use of

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photographs, a defendant still has the right to have counsel present at the identification, again subject to certain exceptions. People v Till, 406 Mich 641, 644; 281 NW2d 297 (1979), People v Anderson, 389 Mich 155, 186-187; 205 NW2d 461 (1973). Because it is undisputed that Williams was in custody during the photographic display and that counsel was not present at the time, the issue becomes whether any of the exceptions to these requirements existed.

The existence of an emergency situation which requires immediate identification constitutes an exception to both requirements. People v Anderson, supra, 186-187 fn 22-23. In the instant case, the prosecution points to the testimony of Sergeant Harris, who stated that he spoke with the doctor treating Knighton at Mr. Carmel Hospital about the possibility (sic) of conducting a

line-up. Harris testified that the doctor replied that it might not be possible since Knighton was in critical condition and was not expected to live. Harris then asked if he could come to the hospital in order to show Knighton some photographs and the doctor replied that he could try. Harris then went to the hospital with Sergeant Taylor and several photographs and after waiting between 30 and 45 minutes were allowed to see Knighton after being told she was still in critical condition. Knighton was unable to speak, but the photographs were placed in front of her and she pointed to the picture of Williams.

On appeal, Williams claims that there was no competent evidence to show that Knighton's condition justified the use of photographs and the lack of counsel. He claims that Harris' testimony on her condition amounted to hearsay. We agree

with the prosecution that the testimony was not hearsay because it was not used to prove that Knighton was in fact in critical condition and not expected to live, but rather was used to show the basis on which the police decided to use photographs instead of a line-up. See MRE 801(c).

We believe the trial court correctly refused to suppress evidence of the identification. Knighton was the only victim who was still alive and the circumstances demanded immediate action. The use of photographs and the lack of counsel were, therefore, justified.

Finally, defendant Williams argues that the trial court erred in failing to order separate trials. There is no absolute right to separate trials. People v Hurst, 396 Mich 1, 6; 238 NW2d 6 (1976). Nevertheless, separate trials should be held when the defenses are

antagonistic. People v Miller, 88 Mich App 210, 222; 276 NW2d 558 (1979). The decision on a request for severance rests in the sound discretion of the trial court and will be reversed on appeal only for an abuse, which requires an affirmative showing of prejudice to the substantial rights of the accused. People v Miller, supra, People v Clark, 85 Mich App 96, 101; 270 NW2d 717 (1978). See MCL 768.5; MSA 28.1028. Such a showing is made where the defenses are shown to be truly antagonistic, People v Hurst, supra, but it is not made where the defenses are not shown to be antagonistic, but merely different. People v Carroll, 396 Mich 408, 414; 240 NW2d 722 (1976), People v Walter Moore, 78 Mich App 294, 298-300; 259 NW2d 351 (1977).

We do not believe that the defenses presented by Marsh and Williams were

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antagonistic or inconsistent. Marsh argued that her participation in the robbery was under duress and that she left before any shooting took palce (sic). Based on closing arguments, Williams' defense appears to have been that he did not shoot the victims and that he did not intend to participate in the killings. Although Marsh's testimony differed from the statement given by Williams to a limited extent, this inconsistency did not result in a situation where the defendants were inculpating each other. The defenses presented by each defendant tended to inculpate the absent Martin, rather than each other. Accordingly, the trial court did not err in refusing to grant separate trials.

Having found no reversible error, the defendants' convictions are affirmed.

Affirmed.

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[1] The Supreme Court has granted leave to consider this issue. See, e.g., People v Wright, 402 Mich 938 (1978), People v Thompson, 402 Mich 938 (1978).

[2] The Supreme Court has held that non-felony first-degree murder requires a showing of express malice, that is, a showing of an actual intent to kill. People v Garcia, 398 Mich 250, 259; 247 NW2d 547 (1976). The same is not true in first-degree felony murder, where implied malice is sufficient. People v Langston, 86 Mich App 656, 660; 273 NW2d 99 (1978). The distinction is based on the fact that under the statute common law murder (which requires either express or implied malice) is elevated to murder in the first degree on proof of certain additional elements. See MCL 750.316; MSA 28.548. If it is elevated on a showing that the murder was "wilful, deliberate, and premeditated" then it follows that the malice must be express. If, on the other hand, it is elevated on a showing that the murder occurred during the course of an enumerated felony this additional element does not limit the nature of the malice which must be shown and either express or implied malice will suffice. People v Hill, 94 Mich App 777; 288 NW2d 408 (1979), People v Wright, 80 Mich App 172, 178-179; 262 NW2d 917 (1977), lv gtd, 402 Mich 938 (1978).

[3] The Court in Poplar addressed the issue in terms of what the jury could reasonably infer from the evidence. It thus appears that the Court was applying a standard more akin to that in Hampton rather than the now discredited "any evidence" standard.

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[4] Such a cautionary instruction is not, by itself, sufficient to overcome the violation of confrontation rights. Bruton v United States, supra.